

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

APPENDIX TO BRIEFS

704

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NO. 23,608

KARIN BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VICTORY BROADCASTING COMPANY,
ARCHWAY BROADCASTING CORPORATION, and
VIC-WAY BROADCASTING COMPANY,

Intervenors.

APPEAL FROM ORDER OF FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 6 1970

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[1]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 65R-341

73488

In re Applications of)
)
* * * * *)
GREAT RIVER BROADCASTING, INC.) * * * * *
St. Louis, Missouri)
* * * * *)

Appearances

* * * * * * *

[2]

DECISION

By the Review Board: Slone and Pincock. Board Member Kessler dissenting and issuing a separate "statement of the case".

1. This proceeding involves the application of Pike-Mo Broadcasting Co. (Pike-Mo) for interim operating authority at Louisiana, Missouri, (1390 kc, 500 w, Day, Class III); and the applications of Great River Broadcasting, Inc. (Great River), Missouri Broadcasting, Inc. (Missouri), Radio Thirteen-Eighty, Inc. (Radio Thirteen-Eighty), Thirteen-Eighty Radio Corporation (Thirteen-Eighty Radio), Clermont Broadcasting Company (Clermont), and Victory Broadcasting Company, Inc. (Victory) for interim operating authority at St. Louis, Missouri. All of the St. Louis interim applicants specify 1380 kc, 5kw, DA-N, U, Class III, except Victory, which would operate DA-2 and Clermont which would operate with a power of one kilowatt during the day and 500 watts at night, non-direction.^{1/}

2. These applications were filed in response to the Commission's Public Notice, FCC 65-260, of April 1, 1965, in which the Commission outlined the procedure for considering applications for the frequency to be vacated by Station KWK, St. Louis, Missouri (1380 kc, 5 kw, DA-N, U, Class III), which is scheduled to discontinue operation at the end of the broadcast day on September 30, 1965. See Order, FCC 65-655, released July 22, 1965. In its Public Notice of April 1, 1965, the Commission added:

"Notice is also given that the Commission will consider joint applications (by applicants for permanent authority) or individual applications (by parties not seeking permanent authority) for interim authority to operate KWK's facilities . . .".

3. By Memorandum Opinion and Order, FCC 65-612, released July 8, 1965, the Commission designated the applications for interim authority for oral argument before the Review Board on the following issues:

1. To determine whether interim operation either on 1380 kilocycles at St. Louis, Missouri; or on 1390 kilocycles at Louisiana, Missouri (pending the Commission's final determination with respect to the pending applications for permanent authority) would serve the public interest, convenience, and necessity.

1/ There are 12 applications pending for regular authorization on 1380 kc at St. Louis, Missouri.

[3]

2. If the foregoing issue is decided affirmatively, to determine which, if any, of the above-captioned proposals, as existing or amended, for interim operation should be granted, and to determine the terms and conditions of the interim operation.

In its Order, the Commission also, among other matters, authorized the Board (a) to make the required finding of basic qualifications of the entity which shall be granted interim authority, and (b) to approve or recommend an equitable formula for joint operation; or consider the merits of a formula for joint operation agreed to by the parties. Beloit Broadcasters, Inc., licensee of standard broadcast Station WBEL, South Beloit, Illinois (1380 kc, 5 kw, DA-N, U, Class III), was made a party to the proceeding.2/

4. Oral argument before a panel of the Review Board was held on July 15, 1965. Based on our consideration of the record herein, together with the various pleadings and briefs filed in support of, in comment on, or in opposition to the respective interim applications, the Board is constrained to conclude that all of the applications for interim authority should be denied.

5. Of the seven applicants for interim authority, six propose to locate in St. Louis, Missouri. This city has a population of 750,026 persons, and its Urbanized Area has a population of 1,667,693 persons. In addition to KWK, the city of St. Louis is assigned seven standard broadcast stations, six FM broadcast stations, and six TV broadcast stations. The seventh applicant, Pike-Mo, proposes to operate in Louisiana, Missouri. Louisiana, population 4,286 persons, is the county seat of Pike County, population 16,706 persons, and is located approximately 72 miles northwest of St. Louis. No standard, FM, or TV broadcast station

is assigned to Louisiana or to Pike County. There is no indication of the number or location of standard broadcast stations which provide primary service to Louisiana and Pike County.

6. Of the seven applicants for interim authority, five are also applicants for regular authority. Only Thirteen-Eighty Radio and Radio Thirteen-Eighty have not applied for regular authority. However, the stockholders of Thirteen-Eighty Radio are principals of KWK Broadcasting Corporation, an applicant for regular authority to operate on

2/ The licensee of Station WBEL is an applicant for authority to make changes in its nighttime directional antenna pattern. Havens and Martin, Inc., licensee of Station WMBG, Richmond, Virginia, and South Central Broadcasters, Inc., licensee of Station KJPW, Waynesville, Missouri, were on the Board's own motion authorized to participate in the oral argument. The licensees of these three stations oppose various interim proposals based on allegations of interference.

[4]

1380 kc in St. Louis. Thus, in effect, Radio Thirteen-Eighty is the only applicant for interim authority which is not an applicant for regular authority. Radio Thirteen-Eighty is a corporation composed of seven other corporations which have tendered applications for regular operations on 1380 kilocycles in St. Louis. 3/ It proposes to construct facilities at a site which "virtually adjoins" the existing KWK site at a cost of \$120,000. Radio Thirteen-Eighty's coverage would be almost identical to that of the existing KWK operation. All of the applicants proposing essentially the same facilities as Station KWK would cause interference to four standard broadcast stations located in various states during the day; and to 17 stations located in various states, and one station located in Canada, at night. KWK serves, interference-free, approximately 2,352,000 persons in an area of approximately 12,800 square miles during the day; and approximately 1,759,400 persons in an area of approximately 1,600 square miles at night.

7. The only proposals which will not require the construction of new facilities are those of Thirteen-Eighty Radio and Clermont. Thirteen-Eighty Radio proposes to use the existing KWK equipment and transmitter site. Although Thirteen-Eighty Radio indicates a willingness to have others participate in its interim proposal, none of the other applicants have joined it, based mainly on their allegations that the terms for the use of the existing facilities are unreasonable.4/ Clermont proposes to use the 500 foot tower of Station KCFM (FM) with a power of one kilowatt during the day and 500 watts at night, non-directional. Clermont alleges that its proposal would require an investment of \$24,895.

8. The principles governing the establishment of interim operating authority are most fully set forth in two cases: Community Broadcasting Co., Inc. v. FCC, 107 U.S. App. D.C. 95, 274 F. 2d 753, 19 RR 2047 (1960), and Oak Knoll Broadcasting Corporation, FCC 64-665, 2 RR 2d 1011 (1964). Community involved two mutually-exclusive applicants for a VHF television channel that had been reassigned to Baton Rouge, Louisiana. One of the applicants, which was operating a UHF station in Baton Rouge, applied for a Special Temporary Authorization (STA) to permit immediate use of the VHF channel without awaiting the results of the comparative hearing. The Commission granted the application, with conditions stating

3/ The seven corporation are: Archway Broadcasting Corporation; Bi-State Radio, Inc.; Gateway Broadcasting Company; Home State Broadcasting Corporation; Prudential Broadcasting Company; Six-Eighty-Eight Broadcasting Company; and St. Louis Broadcasting Company.

4/ These terms include the rental of existing facilities for \$7,500 per month (\$90,000 per year), and the purchase by the successful applicant of the facilities for \$1,000,000.

[5]

that no effect would be given to any expenditure of funds and that no preference would be accorded by virtue of the temporary grant. The Court noted that the Commission's grant was predicated on the facts that the Baton Rouge reallocation problem had been under formal consideration for several years; that a regular authorization could not be made for several years; and that the public need for an additional VHF channel at Baton Rouge,5/ which need had led to the reassignment of channels, could be promptly met only by the grant of an STA.6/

9. The Court of Appeals held that, under Section 309(a) of the Communications Act and Section 1.362(b) (now 1.592(a)) of the Rules, the Commission has the authority to grant an STA. However, the Court noted that a "temporary" grant for two and one-half to three years so closely approximates a statutory three-year license that it is rightly characterized as an "extraordinary" procedure. In order to warrant such a procedure, in the Court's opinion, ". . . the public interest must be clear and it must be made the subject of explicit findings . . .". The Court was primarily concerned with the possible prejudicial effects to the regular proceeding which might be caused by the investment of the interim grantee and the advantages of an interim grantee as an applicant in the subsequent proceeding. Thus, the Court stated that the question was ". . . whether the service in question is so immediate and imperatively necessary that it must be granted at once in spite of the great financial risk of one party and the prejudicial effect on the other party who is not favored . . .". The conditions which the Commission had at-

tached to the STA were held by the Court as not controlling because "[o]rdinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their efforts or intent."

10. The Oak Knoll Broadcasting Corporation case, supra, involved 19 applicants for "regular authority" for the facilities of Station KRLA, a 50 kilowatt station assigned to Pasadena, California, the license of which had not been renewed. Five interim applications were before the Commission, all requesting interim authorization at Pasadena. Three of the interim applicants were applicants in the regular proceeding; one, Radio Eleven Ten, was comprised of five regular applicants; and one, Oak Knoll, was not seeking a regular authorization. Oppositions were filed by several of the regular applicants, some of whom were seeking to use the facilities in California communities other than Pasadena.

5/ There was one other VHF station located in Baton Rouge. The applicant's UHF station was allegedly operating at a loss.

6/ The terms STA and interim operating authority are synonymous, and are used interchangeably.

[6]

11. The Commission granted the application of Oak Knoll. In its opinion, the Commission rejected the contention of several parties that, even absent prejudice to any of the parties, an interim authorization cannot be granted unless there is a compelling and immediate need for the service. Citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), the Commission held that the criterion for its action is the public interest. Therefore, in order to determine whether an interim authorization is warranted, the public benefits to be derived must be weighed against the detriments, disadvantages, and prejudice which might be caused. Thus, when there is no detriment, disadvantage, or prejudice to any of the parties in the subsequent proceedings, there is only benefit to be derived from the interim authorization.

12. Applying this standard to the Oak Knoll case, the Commission found that the public interest would be served by the grant of interim operating authority to Oak Knoll. Public benefits to be derived from the interim operation included the facts (a) that such operation (1) would make use of a 50 kilowatt assignment; (2) would protect the interests of the United States under international agreements by avoiding any possibility of controversy,^{7/} and (3) would provide needed funds for educational television (Oak Knoll promised to distribute its profits to Los Angeles' only educational television outlet and other charities); and (b) that the existing Pasadena stations all presented specialized programming; and (c) that the power and coverage of the KRLA facilities, together

with its record of financial success, lent assurance "that the station has served as an effective competitive medium."

13. The Community case, supra, was distinguished on the grounds that there the interim grantee was an applicant in the subsequent proceeding and would have had to make a substantial investment to construct and operate the station, whereas in Oak Knoll the interim grantee was not a regular applicant, could lease the physical plant for \$100,000 a year, and profits could be anticipated so that any initial investment would be returned prior to the termination of the interim operation. Thus, the Commission indicated the two principal factors which might prejudice the regular proceeding--investment and an interim operation by one of the competing applicants in the regular proceeding--were not present. Oak Knoll was preferred over Radio Eleven Ten, see paragraph 10, supra, because Radio Eleven Ten was composed of regular applicants; because certain other applicants which were also existing licensees could not participate in this proposal (in view of duopoly rules); and because no such benefit to educational TV as would flow from a grant to Oak Knoll would be achieved by a grant to Radio Eleven Ten. With respect to the

7/ The Commission specifically did not invoke the provisions of Section 1.592(a) (3) of the Rules, which allows such operations when a delay would jeopardize the treaty rights of the United States.

[7]

other applicants, who were also applicants in the regular proceeding, the Commission noted that ". . . we have a serious question whether a grant to the applicants other than Oak Knoll or Radio Eleven Ten would be consistent with the public interest in the light of the Community case . . .".

14. In reaching its decision in favor of Oak Knoll, the Commission further considered whether grant of an interim authorization would be prejudicial to the Section 307(b) determination to be made in the regular proceeding. The Commission concluded such not to be the case because the Section 307(b) issue in the regular proceeding could not be resolved by a presumption concerning the need for service to Pasadena, since there were already available to it multiple radio services, and since a Section 307(b) determination must be buttressed by substantial evidence regarding the comparative needs of the several communities and comparative efficiency in utilization of the frequency. It further concluded that each of the applicants had the identical burden in the subsequent proceeding of establishing a greater need for the use of the frequency in its respective community, and that the burden was unchanged by an interim operation; and that the prior use of the frequency in Pasadena was one factor that must be considered in any event. In the Commission's view, for all practical purposes, it made little

difference whether the frequency was in actual use as an interim operation in Pasadena at the time a decision would be rendered in the subsequent regular proceeding or whether the frequency had been in use in Pasadena for a 20-year period ending just a few years before the decision in the subsequent proceeding. Finally, the Commission flatly stated that it would resolve the Section 307(b) issue in the subsequent proceeding without regard to the interim operation.

15. Applying the principles thus enunciated to the proposals before us leads us to the conclusion that none can be granted. The applicants for interim authority other than Radio Thirteen-Eighty are applicants for permanent authority. As stated in the Community case, supra, "the grant of temporary authority to one of several applicants before there has been any hearing is pregnant with danger to truly comparative consideration." The problem which thus concerned the Court applies to each of the applicants for interim authority, except Radio Thirteen-Eighty. The Board finds no immediate and compelling need either in St. Louis or Louisiana^{8/} which might override the prejudicial effect resulting from a grant of interim authorization to one or more of the applicants for regular authorization. Therefore, we shall give no further consideration to these applications, and they will be denied.^{9/}

8/ An interim operation at Louisiana would provide that city with its first local transmission service. However, we do not consider that fact, standing alone, as constituting a compelling and immediate public need.

9/ This position is in accord with the Commission's public notice inviting interim applications. See paragraph 2, supra.

[8]

16. With respect to the application of Radio Thirteen-Eighty for St. Louis, the most obvious benefit to the public to be derived from an interim operation in St. Louis is that it would make use of a five kilowatt assignment, and that such an interim authorization would maintain the status quo as to standard broadcast allocations until the final disposition of the frequency can be made. The Radio Thirteen-Eighty proposal for St. Louis would cause interference to several existing stations. Some of these stations which would suffer interference have objected to an interim authorization, contending that interim applications should be treated as "new" applications and, thus, under Section 316 of the Act, existing stations have a right to a hearing before their licenses can be modified. We agree that this contention raises a serious problem and in the absence of a clear and compelling showing of immediate need for the service proposed, an interim application should not be granted without hearing. 10/ See American Broadcasting Corp., Inc. v FCC, 89 U.S. App. D.C. 298, 191 F.2d 492, 7 RR 2033 (1951).

17. Where, as here, Radio Thirteen-Eighty proposes to make a substantial investment in order to construct a station to be operated on an interim basis in St. Louis, a community whose needs must be compared in a subsequent proceeding for regular authorization with those of another community and other areas, and where, as here, such interim operation will (a) cause interference to existing stations, and (b) where dissimilar proposals for regular operation in the same community are to be considered in the subsequent adjudicatory proceeding, the possibility of prejudice to the determination of the issues in the subsequent hearing is very real. The fact that the investment in the interim operation will be divided among 7 applicants for regular operation does not materially diminish this possibility. The amount each applicant will invest for regular authorization cannot be characterized as minimal, and the entire investment will result in the establishment of a new five kilowatt installation in St. Louis. Therefore, any cognizance taken in the regular proceeding of the interim investment, or any tendency of the interim grant to discourage competitors for the construction permit, would place the 7 interim applicants in a favorable position vis-a-vis the applicants not participating in the utilization of the interim facilities and the parties contending that the interference caused by a five kilowatt St. Louis station should not be allowed.

10/ It was argued that when the Commission waived the note to Section 1.571 of its rules to permit applications to be filed despite the rule prohibiting overlap, it determined that a station providing substantially the same facilities as KWK at St. Louis should be maintained in St. Louis and that to the extent KWK now causes interference to existing stations, these stations have no rights under Section 316 of the Communications Act. We do not so construe this action. The Commission merely waived a procedural rule to permit the filing of applications. We do not believe that in so doing the Commission in any way intended to modify rights which might accrue to existing licensees under Section 316 of the Communications Act.

[9]

18. As stated in the Community case, supra, ". . . if the grant is ultimately made to appellant (the competing applicant) rather than to intervenor (the interim grantee) . . . the latter's market to dispose of its large 'temporary' investment in a going television station is 'one man', i.e., the successful applicant . . . To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a challenge to the good faith of integrity of the triers; it is a recognition that they are mortal man." (Footnote omitted). Here, not only will the investment be substantial, but if St. Louis is not favored in the regular proceeding under the Section 307(b) or interference issues, the interim operator would have no market for its investment. Under these circumstances, it is impossible to say that the regular proceeding would be free from any prejudice.

19. We conclude that (1) the proposal for interim operating authority of Radio Thirteen-Eighty could result in prejudicing the outcome of the regular proceeding; (2) grant of this proposal might abrogate the hearing rights of stations subject to interference; and (3) there is no compelling or immediate need for an interim authorization in St. Louis; and therefore, the detriments resulting from an interim authorization to Radio Thirteen-Eighty outweigh the benefits, so that the proposal of Radio Thirteen-Eighty would not serve the public interest.

20. By letter, dated August 2, 1965, eleven of the twelve St. Louis applicants (all but Clermont Broadcasting Company) indicated that they had reached an agreement with Milwaukee Broadcasting Company for the purchase of the present facilities of Station KWK for a total purchase price of \$650,000 (of which \$450,000 is to be the subject of a five-year loan). A second letter, dated August 13, 1965, requests that the Board act upon the various interim applications without waiting for the documents reflecting the indicated purchase to be filed. In the absence of a properly filed application reflecting this proposal, we cannot rule on its merits. We note, however, that in view of the substantial investment which appears to be required, the defects of the proposals before us may also be present in this new proposal. 11/

11/ In its notice, the Commission indicated that the Board might suggest an equitable formula for an interim operation. However, the fixed positions taken by the applicants for St. Louis, on the one hand, and by the applicant for Louisiana, on the other, that the interim operation should be located in their respective communities, and the vigorous objections of the intervenors to an interim authorization preclude the effectuation of such a formula.

[10]

ACCORDINGLY, IT IS ORDERED,12/ This 14th day of September, 1965, That all of the above-captioned applications for interim operating authority ARE DENIED.

/s/ Dee W. Pincock
Member, Review Board
Federal Communications Commission

Attachments

Released: September 15, 1965

12/ This action carries with it disposition of a large number of other petitions and pleadings filed in this proceeding both before and after its designation for hearing. Appropriate actions are ordered as to such petitions and pleadings in the Appendix attached hereto.

Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 65-1157
 77435

In re Applications of)
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)
 GREAT RIVER BROADCASTING, INC.)
 St. Louis, Missouri)
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MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger dissenting and issuing a separate opinion in which Commissioner Wadsworth joins.

1. The Commission has before it for consideration applications for review of the Review Board's decision (FCC-65R-341, released September 15, 1965) in the above-captioned proceeding, together with responsive pleadings.1/ Six of the above-described applications request authority for interim operation of a standard broadcast station in St. Louis, Missouri, on the frequency to be vacated in that city by Station KWK. 2/ The seventh application, that of Pike-Mo Broadcasting Co.

1/ See the Appendix attached hereto which sets forth the various pleadings which are before the Commission.

2/ Station KWK operates as follows: 1380 kc, 5 kw, DA-N, U, Class III. By Order (FCC 65-1055), released November 29, 1965, the Commission authorized KWK Radio, Inc., to continue operation of Station KWK until the end of the broadcast day on January 31, 1966, pending disposition of the applications for review of the Review Board's decision.

(Pike-Mo), specified interim operation in the community of Louisiana, Missouri, (about 72 miles from St. Louis) on the adjacent frequency of 1390 kc, and proposed 500 watts of power, daytime only. One of the six St. Louis interim applicants (Clermont Broadcasting Company) specified operation on 1380 kc with 1 kw of power, daytime, and 500 watts at night. The remaining St. Louis applications for interim authority specify the same operating characteristics as Station KWK except for the application of Victory Broadcasting Company, Inc., which specified separate directional antennas day and night (DA-2). Radio Thirteen-Eighty, Inc. (RTEI)

is the only joint interim applicant. As presently constituted, it is composed of seven applicants who are, individually, seeking permanent authority in St. Louis.

2. After oral argument, the Review Board denied all the interim applications. The Board stated that an interim grant to any one applicant who was also seeking permanent authority could prejudice the final outcome of the comparative hearing yet to be held, and that no imperative need for an interim operation outweighed that adverse possibility. This finding, the Board held, ruled out further consideration of all interim applications save the joint proposal of RTEI. 3/ Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 95, 274 F.2d 753 (1960); Oak Knoll Broadcasting Corporation, 2 Pike and Fischer, R.R. 2d 1011 (1964). We agree that this holding correctly reflects existing law.

3. The Board then considered the joint RTEI proposal and concluded that it, too, should be denied. Initially, the Board felt that a grant of the application would raise serious problems with respect to hearing rights of existing stations subject to interference from the interim operation -- even if this interference was the same as that presently received from KWK. Moreover, the Board stated, a grant of RTEI's proposal could prejudice the outcome of the regular proceeding in two ways: First, the substantial investment RTEI would make to construct interim facilities (\$120,000) could place the regular applicants participating in the RTEI proposal in a favorable position vis-a-vis the regular applicants not participating. Second, the investment of this sum and the continuation of KWK's operation in St. Louis might work to the disadvantage of an applicant in this proceeding seeking permanent authority to use a frequency adjacent to that being vacated by KWK, at a location other than St. Louis.

3/ Although Thirteen-Eighty Radio Corporation has applied only for interim authority, it involves the same personnel as KWK Broadcasting Corporation, a permanent applicant. We affirm the Board's holding that the two corporations are sufficiently identical to disqualify Thirteen-Eighty under the rationale set forth above.

[3]

4. We disagree with the Board's holdings as to the RTEI proposal. For the reasons set forth below, we are granting RTEI's application subject to certain conditions.

5. A grant without an evidentiary hearing of an interim application proposing essentially the same operating characteristics as existing KWK would not illegally or improperly modify the licenses of existing stations in violation of Section 316 of the Communications Act. Insofar

as the record and pleadings of this proceeding disclose, existing stations would be subject to no more interference from the RTEI interim proposal for St. Louis than they now receive from existing KWK. The licenses of all such stations have been granted or renewed subject to this interference and a grant of interim authority would, therefore, do no more than maintain the status quo. A different situation would be presented if grant of an interim authorization would, for the first time, create interference to existing stations. In that situation some persons accustomed to receiving service from the existing stations would either be deprived of such service or would receive substituted service from the station granted an interim authority, thus raising at the outset important public interest considerations. Here, we believe, the public interest would best be served by maintaining the status quo for the interim period necessary to complete the proceedings involving regular authority to operate on the frequency to be vacated by KWK, or on an adjacent frequency.

6. We do not feel that the investment contemplated by RTEI is so large as to prejudice the hearing rights of any party not participating in the interim operation. RTEI's plans call for an expenditure of \$120,000 to construct new facilities at a site virtually adjoining the present KWK site.^{4/} At least seven parties will bear equal portions of this burden. Moreover, the RTEI proposal is "open-ended" in that all other permanent applicants may become parties to it if they so desire, and it is most probable that the number of participants in RTEI will increase following our grant of its application today. Under these circumstances, we do not regard the investment any one party may make in the interim operation as significant, particularly when compared with the large costs to the parties of prosecuting their applications for regular operation.

7. Maintenance of the status quo in St. Louis during the regular proceeding will not prejudice the chances of applicants seeking use of KWK's frequency elsewhere. With or without an interim operation,

4/ RTEI plans to build new facilities because it has been unable to obtain what it regards as a satisfactory agreement for purchase or lease of the existing KWK facilities. If RTEI and KWK should reach such an agreement within 30 days of the release of this order, we will entertain an appropriate application for modification of the facilities herein granted. In evaluating any such modification application, we will, of course, consider the extent of the investment RTEI would be required to make.

[4]

the question before us in the regular proceeding is the same -- i.e., whether a broadcast frequency used for almost forty years by a station in St. Louis should now be used at some other location or at all. Our

resolution of this question will not be affected by a continuation of KWK's long existing service for the comparatively brief additional period this hearing will take. Nor will our resolution of the question be affected by the total investment in an interim St. Louis operation by RTEI. The parties to RTEI have undertaken that investment voluntarily will full knowledge of the risk that KWK's frequency may ultimately be assigned elsewhere and we make this grant with explicit note of that fact.^{5/}

8. In sum, we believe that a grant of the RTEI application would be consistent with the Community case and the Commission's policies as to interim operation in these circumstances. It would not be detrimental to the holding of a fair hearing, and the grant would serve the public interest by continuing during the interim period a broadcast service which has been available to the listening public for many years.

9. In view of the foregoing, IT IS ORDERED, This 22nd day of December, 1965, that the application for review filed by Radio Thirteen-Eighty, Inc., IS GRANTED to the extent indicated below and that all other applications for review described above ARE DENIED.

IT IS FURTHER ORDERED, That the motion to substitute party intervenor, filed December 6, 1965, by Roy H. Park Broadcasting of Virginia, Inc., IS GRANTED.

IT IS FURTHER ORDERED, That the above-captioned application of Radio Thirteen-Eighty, Inc., File No. BPI-11, IS GRANTED, subject to the following conditions:

(a) Within thirty days following release of this Order, any other applicant in the interim hearing proceeding Docket 16094, et. al. may become a party to Radio Thirteen-Eighty, Inc., on equal terms and conditions with all other parties to that interim grantee.

(b) Within thirty days following release of this Order, Radio Thirteen-Eighty, Inc. may apply for a modification of the authority if it should obtain an agreement for use of the existing physical facilities of KWK.

(c) The terms of the agreement between parties to Radio Thirteen-Eighty, Inc. may not require that the winning applicant in this proceeding purchase the physical facilities of Radio Thirteen-Eighty, Inc. when the interim operation herein authorized is terminated.

5/ We are conditioning RTEI's grant to provide that the interim agreement may not require the winning party in this proceeding to purchase RTEI's facilities.

IT IS FURTHER ORDERED, That the interim operation herein authorized shall terminate upon grant of program test authority to the winning applicant in the forthcoming regular hearing proceeding, or upon final denial of all applications in that proceeding.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple
Secretary

Released: December 27, 1965

*See attached dissenting statement of Commissioner Bartley and Separate Opinion of Commissioner Loevinger in which Commissioner Wadsworth joins.

[1]

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent.

The majority's grant of the RTEI application for "interim" operation is contrary to the Court's holding in Community Broadcasting Co., Inc. v. FCC, 107 U.S. Appl. D.C. 95; 274 F. 2d 753; 19 RR 2047, and to the majority's own action in Oak Knoll Broadcasting Corporation, 2 RR 2d 1011.

In Community, *supra*, the Court noted that a "temporary" grant for two and one-half to three years so closely approximates a statutory three-year license period that it is an "extraordinary" procedure; and that in order to warrant such a procedure the question, ultimately, was "whether the service in question is so immediate and imperatively necessary that it must be granted at once in spite of the great financial risk of one party and the prejudicial effect on the other party who is not favored." The Court recognized compelling public interest considerations such "as for example, where a community has no existing service or stands to lose its only service."

The need for continued service on the KWK facility in St. Louis is not immediate or imperatively necessary. Seven standard broadcast stations, six FM broadcast stations, and six television stations are now licensed to operate in St. Louis. Such abundance of broadcast services negates any necessity for the "extraordinary" procedure of temporary operation. Moreover, the present KWK facility causes interference, daytime, to 4 standard broadcast stations and, nighttime, to 17 stations. The public interest may well be served better by the extended coverage which those stations would provide with cessation of operation by KWK.

In Oak Knoll, *supra*, the Commission majority gave decisive weight to the fact that the interim grantee was not a regular applicant, and specified the fact as a ground for distinguishing Oak Knoll from Community. But, in the instant case, the Commission majority grants an application for interim operation by applicants for regular operation. Moreover, in Oak Knoll, the Commission majority conditioned the interim grant on elimination of KRLA's existing 2 and 25 mv/m overlap with KSDO and nighttime interference to KFAB. But, in the instant case, the Commission majority grants a proposal for continued operation on the KWK facility which involves existing interference with 4 stations daytime and 17 nighttime.

"Interim" operation under the circumstances here is contrary to previous Commission action. For example, the Commission, on September 18, 1963, dismissed by unanimous vote (5-0), an application by Swannanoa Valley Broadcasting

[2]

Company for the revoked facilities of WBMT, Black Mountain, North Carolina. The applicant sought this facility so that there would be "no prolonged interruption of the radio service formerly provided by WBMT." The applicant also stated that the only other local station in Black Mountain is primarily an educational and religious station for the region and that continuation of WBMT service was needed to serve local interests in Black Mountain. The Commission stated that it could not find "extraordinary circumstances requiring emergency operations in the public interest." That action was prior to Oak Knoll, which, I believe, was contrary to the Court's holding in Community Broadcasting Co.

The decision here of the Commission majority to determine, without facts of record, that continued use of the frequency in St. Louis better serves the public interest than use of the frequency in Louisiana, Missouri, as proposed by Pike-Mo is, I believe, serious error and highly prejudicial to Pike-Mo (Section 307(b) of the Communications Act). The Community case involved a comparative hearing on television applications for the same city, and there is no inference to be drawn that the Court would have sanctioned any type of interim operation if it had been faced with a 307(b) hearing on standard broadcast applications where the threshold question is, as here, which city has the greater need for the services proposed. Television channels are assigned to various communities on the basis of rule making. Applicants for standard broadcast stations specify use of a frequency in whatever communities they choose. Thus, there is no inherent right to continued use of the standard broadcast frequency 1380 kc in St. Louis. To the contrary, the Commission has revoked the license to operate on 1380 kc in St. Louis. The frequency is now open to all applicants. Where its use would best serve the public interest must be determined on facts of record in an evidentiary hearing. The foregoing also establishes, I believe, that existing stations which

would receive interference from this new use of the frequency are entitled to an evidentiary hearing under Section 316 of the Act before their licenses can be so modified.

RTEI's \$120,000 investment in construction of a new station for the interim operation is, I believe, highly prejudicial to the other applicants for regular operation. As the Court said in Community, *supra*, "The grant of temporary authority to one of several competing applicants before there has been any hearing is pregnant with danger to truly comparative consideration."

The majority's grant here rests on the unsupported assertion that maintaining the status quo for the interim period would best serve the public interest. This falls far short, I believe, of the public interest

[3]

findings necessary to justify the "extraordinary" procedure of an interim authorization.

It has been two and a half years since the Commission revoked the KWK license (May 27, 1963) because of willful misconduct resulting in frauds upon the public. All legal appeals were exhausted with the U.S. Supreme Court's denying certiorari on March 1, 1965. Yet, to this day, the Commission majority has permitted the licensee to continue operating the station. I think it is incumbent upon the Commission in the proper exercise of its statutory responsibilities to end this operation and to order it off the air immediately.

I vote to deny interim operation on the frequency and hold forthwith an evidentiary hearing on the applications for regular operation on this frequency.

[1]

SEPARATE OPINION OF COMMISSIONER LOEVINGER
(Interim Operation in St. Louis, Missouri,
Docket Nos. 16094-16100)

I concur in the opinion of Commissioner Bartley except that I do not agree that revocation of the license involved here necessarily confers the right to an evidentiary hearing under section 316 upon existing stations claiming interference.

Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

B
 FCC 66-374
 82191

In re Applications of)
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 * * * * *)
)
 GREAT RIVER BROADCASTING, INC.)
 St. Louis, Missouri)
)
 * * * * *

* * * *

O R D E R

By the Commission: Commissioner Bartley dissenting; Commissioner Loevinger absent.

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 27th day of April, 1966;

The Commission having under consideration: (a) its Order herein (FCC 66-172, released February 24, 1966) granting, inter alia, special temporary authority to Radio Thirteen-Eighty, Inc. to operate a standard broadcast station on 1380 kc in St. Louis, Missouri, with 5 kw of power daytime and 250 watts of power nighttime, non-directionally, for a period of not more than 60 days from March 1, 1966; and (b) a letter of Radio Thirteen-Eighty, Inc., filed April 26, 1966, requesting that the temporary operating authority previously granted by the Commission be extended for an additional 60 days to and including June 29, 1966;

IT APPEARING, That Radio Thirteen-Eighty, Inc. states that an extension of its temporary operating authority is necessary, inasmuch as Radio Thirteen-Eighty, Inc. is unable to state definitively at this time whether detuning of the towers of former Station KWK will be required to permit Radio Thirteen-Eighty, Inc. to operate in accordance with the terms of its construction permit (BPI-11);

IT FURTHER APPEARING, That Radio Thirteen-Eighty, Inc. has completed the construction authorized by the Commission's grant of its application (BPI-11), is in the process of making the required proof of performance, and that the extension of time herein requested is reasonable;

IT FURTHER APPEARING, That the public interest would be served by a grant of the relief requested by Radio Thirteen-Eighty, Inc.;

IT IS ORDERED, That the above-described request of Radio Thirteen-Eighty, Inc. for extension of its special temporary authority IS GRANTED, but that the special temporary authority to operate Station KWK, St. Louis, Missouri, IS EXTENDED to and including June 30, 1966.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Released: April 28, 1966

[1]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69R-174
30740

In re Applications of)
)
* * * * *) * * * *
GREAT RIVER BROADCASTING, INC.)
St. Louis, Missouri)
)
* * * * *

MEMORANDUM OPINION AND ORDER
Adopted: April 21, 1969 Released: April 22, 1969

By the Review Board: Board Member Nelson absent.

1. The Review Board having under consideration (a) joint request for approval of agreement, grant of application of Victory Broadcasting Co., Inc. as amended, and dismissal of the other above captioned applications, filed Dec. 23, 1968, by Great River Broadcasting Co., Inc., Prudential Broadcasting Co., Six Eighty Eight Broadcasting Co., St. Louis Broadcasting Co., Victory Broadcasting Co., Inc., Home State Broadcasting Corp., Archway Broadcasting Corp., and Missouri Broadcasting, Inc. and pleadings responsive thereto; (b) a pleading for leave to amend, filed Jan. 15, 1969, by Victory Broadcasting Co.; (c) a request for certification to the Commission filed March 7, 1969, by Archway Broadcasting Corp. and Victory Broadcasting Co., Inc.; (d) a letter from St. Louis counsel for Karin Broadcasting Co. addressed to the Hearing Examiner, dated March 27, 1969; (e) a letter reply to (d) from Victory Broadcasting Co. and Archway Broadcasting Corp., dated April 8, 1969; (f) a letter from St. Louis counsel for Karin Broadcasting Co. addressed to the Commission's Chairman, dated April 8, 1969; and (g) a further letter from St. Louis counsel for Karin Broadcasting Co. addressed to the Review Board's Chairman dated April 11, 1969;

2. IT APPEARING, That the joint petition looks toward the approval of an agreement which contemplates the dismissal of 7 of the applications, the grant of the application of Victory, as amended, to reflect a merger between Victory and Archway, and the reimbursement by the new corporate entity Vic-Way Broadcasting Company, of the dismissing applicants for expenses incurred by them in the preparation, filing and prosecution, of their respective applications; and that the petition for leave to amend seeks to amend Victory's application to

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substitute Vic-Way Broadcasting Company for Victory as the applicant, reflect Vic-Way's obligation to reimburse the dismissing applicants in the financial proposal and revise Victory's nighttime engineering proposal; and

3. IT FURTHER APPEARING, That, in the request for certification, Archway and Victory request that the joint petition and petition for leave to amend be certified to the Commission based upon allegations of continuing losses by RTEI, the interim operation, and the consequent obligation of Victory and Archway, pursuant to the settlement agreement, to provide substantial cash advances to that operation; and

4. IT FURTHER APPEARING, That the initial letter from St. Louis counsel for Karin Broadcasting Company raises questions concerning the activities and qualifications of Vic-Way Broadcasting Company, the successful applicant under the settlement agreement, and that its subsequent letter, directed to the Commission, contains allegations that there has been an unauthorized transfer of control of RTEI, the interim operation, and requests that the Commission issue an order to show cause to determine why the temporary authority of RTEI should not be revoked; and

5. IT FURTHER APPEARING, That, in light of the above factors, certification to the Commission would be appropriate and will result in the most expeditious resolution of the matter;

6. IT IS ORDERED, That the request for certification, filed March 7, 1969, by Archway Broadcasting Corporation and Victory Broadcasting Company, Inc. IS GRANTED; and that the joint request for approval of agreement, grant of application of Victory Broadcasting Company, Inc. as amended and dismissal of the other above-captioned applications, filed December 23, 1968, by Great River Broadcasting, Inc., et al.; the petition for leave to amend, filed January 15, 1969, by Victory Broadcasting Company, Inc.,; and the letters from counsel for Karin Broadcasting Company received by the Review Board on April 3, and April 15, 1969; together with all related pleadings and documents

ARE CERTIFIED to the Commission for its consideration.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69-674
33094

In re Applications of)
)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
)
et al.)

O R D E R

Adopted: June 18, 1969 Released: June 19, 1969

By the Commission: Commissioner Bartley dissenting; Commissioners Cox and Johnson concurring in the result.

1. On April 22, 1969, the Review Board released an Order, FCC 69R-174, certifying to the Commission for consideration: (a) a joint request for approval of agreement, grant of the application of Victory Broadcasting Company, Inc., as amended, and dismissal of the other above-captioned applications, filed December 23, 1968, by Great River Broadcasting, Inc., Prudential Broadcasting Company, Six-Eighty Eight Broadcasting Company, St. Louis Broadcasting Company, Victory Broadcasting Company, Inc., Home State Broadcasting Corp., Archway Broadcasting Corporation, and Missouri Broadcasting, Inc., and pleadings responsive thereto;^{1/} (b) a petition for leave to amend filed January 15, 1969, by Victory; (c) correspondence relating to objections of Karin Broadcasting Company to approval of the joint request;^{2/} and (d) letters dated June 17 and 18, 1969, from the applicants.

^{1/} Other pleadings before the Commission are the opposition of the Broadcast Bureau filed February 3, 1969, and replies filed February 25, 1969, jointly by the applicants and by Victory.

2/ The correspondence includes: (1) a letter dated March 27, 1969, from Karin, (2) a responsive letter dated April 8, 1969, from Archway and Victory, (3) a letter dated April 8, 1969, from Karin, (4) a letter reply dated April 11, 1969, from Karin, (5) a letter dated April 21, 1969, from Karin, (6) a letter response dated May 2, 1969, from Archway, (7) a letter reply dated May 14, 1969, from Karin, and (8) further letters dated June 16, 1969 from Karin.

[2]

2. The eight applicants for permanent authority to operate a standard broadcast station on the former KWK frequency (1380 kHz) at St. Louis, Missouri, have filed a joint request which contemplates termination of the comparative hearing, dismissal of seven of the applications, and grant of Victory's application as amended to reflect a merger of Victory and Archway Broadcasting Corporation, one of the dismissing applicants, into a new corporation, Vic-Way Broadcasting Company. Victory will own 75% of Vic-Way, and Archway will own 25%. Vic-Way proposes to reimburse the dismissing applicants for their out of pocket expenses, including their contributions to Radio Thirteen Eighty, Inc. (RTEI), the interim permittee, and to assume RTEI's liabilities. An attached explanatory statement indicates that Victory and Archway will contribute \$300,000 and \$100,000, respectively, to Vic-Way. Each of the dismissing applicants purchased \$5,000 worth of stock in RTEI, and each made loans in varying amounts to RTEI totaling approximately \$345,000. The total requested reimbursements amount to \$996,815.77, including \$99,365.50 to be paid to Archway. The proposed amendment to Victory's application indicates that in addition to the \$400,000 contribution from Archway and Victory, Vic-Way will have available an \$860,000 loan from the Bank of St. Louis and a \$500,000 loan from the Ford Foundation. Victory alleges, however, that Vic-Way only intends to utilize \$500,000 of the \$860,000 commitment from the Bank of St. Louis.

3. The Broadcast Bureau, in opposition, argues that the joint request should not be approved because the applicants are seeking reimbursement of the funds not reasonably and prudently expended in connection with the pending applications. The Bureau also contends that the dismissing applicants failed to substantiate their claims for reimbursement of expenses with sufficient supporting affidavits. The Bureau next suggests that publication pursuant to Section 1.525(b) of the Rules because of the dismissal of the Great River Broadcasting, Inc., and Missouri Broadcasting, Inc., applications may be required by Section 307(b) of the Act.

4. We agree with the Bureau that Section 311(c) of the Act would preclude reimbursement of the dismissing applicants' stock subscriptions and loans to RTEI to the extent that those amounts exceed their present equities in the interim operation. However, on June 17, 1969, the applicants submitted a current balance sheet in support of the joint request, together with a verified appraisal of the current market value of certain real property, which establish that

RTEI's total assets have a value of, or in excess of, \$684,749.59, and that the permittee's total assets exceed its total liabilities (including stockholder loans and capital contributions) by over

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\$172,000.00. The net worth of RTEI is thus more than sufficient to defray the proposed payments for the dismissing applicants' stock subscriptions and loans to RTEI. On the basis of the information provided, including the separate statement concerning the current market value of RTEI's leasehold interest, we are persuaded that these payments fairly reflect the equities which would accrue to the parties upon dissolution of RTEI. See Desert Broadcasting Co., Inc., 17 FCC 2d 279 (1969); and Grand Broadcasting Co., FCC 65-415, 5 RR 2d 527 (1965). Accordingly, we have concluded that the payments to be made to the dismissing applicants under this aspect of the joint agreement would not violate the provisions of Section 311(c).

5. With respect to the Bureau's contention that publication pursuant to Section 1.525(b) is required under the circumstances of this proceeding, we note that such publication is generally limited to cases where the only application or applications for one of a number of communities involved in a Section 307(b) comparison is being withdrawn. In the instant proceeding, since each of the remaining applicants has specified St. Louis, Missouri, as its station location, we are convinced that publication is neither necessary nor appropriate.

6. Among the Bureau's assertions concerning the proposed reimbursement of out of pocket expenses are allegations that the dismissing applicants should not be compensated for payments previously made upon the dismissal of two former applications.^{3/} Such payments would be permissible, if the former applications were being dismissed pursuant to the pending joint agreement, since the reimbursed expenses were clearly related to the prosecution of those former applications. In view of the facts that those payments could have been approved as part of this joint agreement and that the reimbursement were made in order to advance the cause of the present remaining applicants, we conclude that such payments are permitted by Section 311(c) of the Act and that they would not be inconsistent with the public interest. To the extent that such payments relate to the dismissal of an interim application, there are sufficient equities, as noted above, in RTEI to

^{3/} The mutually exclusive applications of Pike-Mo Broadcasting Co. and Salter Broadcasting Company were dismissed in 1966 (2 FCC 2d 946) and in 1967 (9 FCC 2d 800), respectively. Each was reimbursed for its out of pocket expenses by the remaining applicants.

cover this minor additional expense. The Bureau's further argument that reimbursement of Archway should be limited to the extent its expenses exceed its equity in Vic-Way is without merit.^{4/}

7. The Review Board, pursuant to delegated authority, generally considers questions concerning agreements such as this. Thus, the Board has considerable experience and expertise in determining whether specific out of pocket expenses have been properly substantiated and were "legitimately and prudently expended," as required by Section 311(c)(3) of the Communications Act. In order that this matter may be finally resolved in the most expeditious manner possible, we have determined that the Bureau's remaining allegations concerning specific out of pocket expenses should be remanded to the Review Board for its immediate consideration and for a determination of whether or not each of the remaining reimbursement items were legitimately and prudently expended in connection with the preparing, filing, and advocating of the dismissing applications.

8. Finally, a number of letters have been submitted by Karin Broadcasting Company, which is a corporation comprised of a majority of RTEI's employees. It objects to the joint request and urges that RTEI be ordered to show cause why its interim authority should not be terminated. Karin alleges that, since two of the three-member executive committee which supervises the day to day operation of the station have been replaced, an unauthorized transfer of control of RTEI has occurred. However, the executive committee serves at the pleasure of RTEI's Board of Directors. The Board is composed of one representative from each of the current applicants for regular operation. In view of the facts that the new members of the executive committee were elected by RTEI's Board of Directors, that they previously participated as members of the Board of Directors, and that the Chairman of the executive committee remains unchanged, we are convinced that no unauthorized transfer of control has occurred. In other respects, Karin's arguments are totally without merit, since they have not set forth sufficient allegations of fact to raise a substantial and material question of fact.

^{4/} Archway will be a minority stockholder and it is not unusual for a majority stockholder to contribute more than its pro rata share of capital. Archway further proposes to secure financing essential for the implementation of this agreement and for the future operation of Vic-Way. It also appears that Victory will be reimbursed for its expenses as funds are available in the future.

9. For the reasons set forth above, we are of the view that the joint agreement will serve the public interest, convenience, and necessity and that the joint request should be approved subject to the determination by the Review Board that the individual out of

pocket expense items have been properly substantiated.^{5/} Under these circumstances, Victory's related petition for leave to amend may be granted so that the terms of the agreement can be implemented.

10. ACCORDINGLY, IT IS ORDERED, That the joint request for approval of agreement, grant of the application of Victory Broadcasting Company, Inc., as amended, and dismissal of the other above-captioned applications, filed December 23, 1968, by the eight above-captioned applicants IS GRANTED, subject to the determination of the Review Board concerning the proposed reimbursement of specific out of pocket expenses.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed January 15, 1969, by Victory Broadcasting Company, Inc., IS GRANTED.

12. IT IS FURTHER ORDERED, That the informal requests of Karin Broadcasting Company for relief ARE DENIED.

13. IT IS FURTHER ORDERED, That this matter IS REFERRED to the Review Board for further action consistent with this Order and the Review Board IS DIRECTED to conclude this matter as expeditiously as possible.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

^{5/} In view of the applicants' requests for expeditious action and the fact that there is no legal impediment to grant of the joint request to the extent that all reimbursements comply with the limitations of Section 311(c)(3) of the Communications Act, we shall approve the agreement subject to the Board's determination. (Moreover, if the Board should disallow reimbursement of one or more items, and if such disallowance is accepted by the affected parties and the agreement is modified accordingly, the agreement, as modified, will be approved subject to the Board's determination.) The Review Board is also authorized to grant Victory's application, dismiss the remaining competing applications, and take such further action as may be necessary to implement the joint agreement. Thus our action herein will take effect as of the date that the Review Board's order becomes effective.

Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

B
 FCC 69-744
 33328

In re Applications of)
)
 GREAT RIVER BROADCASTING, INC.)
 St. Louis, Missouri) * * * *
)
)
 et al.)

O R D E R

Adopted: July 3, 1969 Released: July 3, 1969

By the Commission: Commissioner Cox concurring in the result;
 Commissioners Bartley, Wadsworth and Johnson absent.

1. By our Order, FCC 69-674, released June 19, 1969, we granted the joint request for approval of agreement filed by the eight applicants in this proceeding. The order further contemplated the grant of the application of Victory Broadcasting Company, Inc., as amended to reflect a merger of Victory and Archway Broadcasting Corporation into a new corporation, Vic-Way Broadcasting Company, and reimbursement of the dismissing applicants' out-of-pocket expenses as determined by the Review Board. On July 1, 1969, Karin Broadcasting Company, a corporation comprised of a majority of the employees of the interim permittee, filed a motion for stay, for reconsideration, for leave to intervene, and/or to offer new evidence.

2. Karin urges that this matter should be stayed for a minimum of 30 days to permit the preparation of an application for interim and permanent authority to operate this facility. Karin asserts that the applicants have transferred control of the interim permittee, Radio Thirteen Eighty, Inc. (RTEI), to Vic-Way without our approval. Karin claims that Vic-Way has given operating funds directly to RTEI, that Vic-Way has exercised management control over RTEI, and that the program format was changed through the efforts of Victory's representative without our authorization. Karin next argues that we have permitted a new entity to come into this proceeding many years after all other prospective applicants were legally excluded. According to Karin, the applicants' agreement provided for Victory and Archway to dismiss their applications and for Vic-Way to apply for

the facility. Since Karin has not been permitted to file an application for this facility, it claims that our action approving the agreement is contrary to the public interest and the requirements of due process.

3. Karin also urges that the financial commitment by the Ford Foundation will allow that entity to control Vic-Way's programming in violation of our Rules. It contends that the financial aspects of the applicants' agreement have not been submitted to scrutiny in a hearing and that we should not have accepted the appraised value for RTEI's leasehold interest. Karin thus concludes that our order was deficient, that it should be permitted to file an application for this facility, and it should be allowed to present the merits of its case in a hearing.

4. Many of Karin's present contentions were considered and rejected in our order approving the applicants' joint agreement. As we noted therein, Karin has not supported its assertions with sufficient allegations of fact to raise a substantial and material question of fact. Although Karin claims that our action is contrary to the public interest, it has not referred to any specific section of the Communications Act or to any particular provision of our Rules. It has not set forth any activities or conduct by the applicants which would violate the Act or our regulations. Rather, Karin has relied on generalized conclusions and unsupported allegations of misconduct. Thus, Karin continues to claim that there has been an unauthorized transfer of control of RTEI, but it has not shown that the authority of RTEI's Board of Directors has been usurped by any other party. As we pointed out in our earlier order, RTEI's executive committee is subordinate and responsible to the Board of Directors. Karin has not presented any new allegations to support its general assertion, and we continue to believe that Karin's contentions are insufficient to show that there has been any unauthorized transfer of control under the circumstances of this proceeding.

5. While Karin urges that it should be permitted to file a new application for this facility, it is clear that our Rules provided ample opportunity for all interested parties to file such applications before this proceeding commenced. If new parties were permitted to file applications at the conclusion of a proceeding, the administrative process might never be completed. Contrary to Karin's assertion, Vic-Way is not a new applicant. It is merely a modification of an existing applicant, after an amendment consistent with our regulations. We are not aware of any provision of the Act or of our Rules that would require Vic-Way to be treated as a new applicant or that would require this proceeding to be opened to new parties. We have often approved such a merger proposal in order to hasten the institution of a new service, and we believe that the public interest will be best served

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under the circumstances of this proceeding by placing the responsibility for operation of this facility on a regular licensee at the earliest possible time.

6. Karin also asserts that RTEI's financial showing was deficient, but our order was based on a detailed and verified balance

sheet which was supported by a verified appraisal of the current market value of RTEI's real estate interests. This data was thoroughly considered along with the material which demonstrated that the appraisal had been made by a reputable firm with extensive experience in that field. In its present petition, Karin has not made any counter submission to impeach the credibility or veracity of the material submitted by RTEI. In view of this fact and since we previously determined that RTEI's showing was sufficient, we are not persuaded that our order was deficient in any respect. Nor has Karin provided any support for its assertion concerning the Ford Foundation which would show that these financial arrangements are contrary to our Rules or the public interest. While we understand and are sympathetic toward Karin's concern for the status of its stockholders as employees of the KWK facility, Karin's contentions concerning this matter have not been supported by sufficient specific allegations of fact to raise a substantial and material question of fact. For these reasons, we are convinced that all aspects of Karin's petition should be denied.

7. ACCORDINGLY, IT IS ORDERED, That the motion to stay this proceeding and for other relief, filed July 1, 1969, by Karin Broadcasting Company IS DENIED in all respects.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

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B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69R-293
34546

In re Applications of)
)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
)
et al.)

MEMORANDUM OPINION AND ORDER
Adopted: July 9, 1969 Released: July 10, 1969

By the Review Board: Board Member Nelson not participating.
Board Member Berkemeyer abstaining.

1. This proceeding involves the eight remaining mutually exclusive applications for a permanent authorization to operate a standard broadcast station on the former Station KWK frequency (1380 kHz) at St. Louis, Missouri. It was designated for hearing by Order, 6 FCC 2d 809, 9 RR 2d 577, released February 21, 1967. During the pendency of

the hearing, the former KWK facilities have been kept operational by an interim permittee, Radio Thirteen Eighty, Inc. (RTEI), pursuant to a temporary authorization granted by the Commission on December 27, 1965. See Pike-Mo Broadcasting Co., et. al, 2 FCC 2d 207, 6 RR 2d 581 (1965); affirmed sub nom. Beloit Broadcasters, Inc. v FCC, 365 F.2d 962, 7 RR 2d 2155 (D.C. Cir. 1966). The present stockholders of RTEI are the remaining eight applicants, each of whom is represented on RTEI's eight-member Board of Directors. On December 23, 1968, the eight applicants filed a joint request with the Review Board, seeking approval of an agreement which contemplates the dismissal of seven of the applications, the grant of the application of Victory Broadcasting Company, Inc. (Victory), as amended, to reflect a merger between Victory and Archway Broadcasting Corporation (Archway), and the reimbursement by the new corporate entity, Vic-Way Broadcasting Company (Vic-Way), of the dismissing applicants for expenses incurred by them in the preparation, filing and prosecution of their respective applications and for capital contributions and loans to RTEI. In addition, the Hearing Examiner, by Order, FCC 69M-70, released January 21, 1969, certified to the Review Board a petition for leave to amend, filed with him by Victory on January 15, 1969; 1/ and Victory and Archway, on March 7, 1969, filed a request for

1/ The purpose of the amendment was to substitute Vic-Way for Victory as the applicant, amend the financial proposal to reflect Vic-Way's obligation to reimburse the dismissing applicants, and revise Victory's night-time engineering proposal.

[2]

certification of the joint request and petition for leave to amend to the Commission. Finally, a number of letters were submitted by Karin Broadcasting Company (Karin), a corporation comprised of a majority of RTEI employees, objecting to the joint request and urging, among other things, that RTEI be ordered to show cause why its interim authority should not be terminated.

2. On April 22, 1969, the Review Board released an Order FCC 69R-174, FCC 2d , certifying to the Commission for its consideration the joint request, the petition for leave to amend and all responsive and related pleadings and documents. The Commission, by Order, FCC 69-674, FCC 2d , released June 19, 1969, granted the petition for leave to amend and accepted the amendment; denied the informal requests of Karin for relief; granted the joint request, subject to the determination of the Review Board concerning the amount of allowable reimbursement for specific out-of-pocket expenses; and referred the proceeding to the Review Board for further action consistent with its Order. 2/ The Commission concluded that the proposed reimbursement of the dismissing applicants' stock subscriptions and loans to RTEI and payments made by these parties upon the dismissal of two former applications 3/ (items challenged by the Broadcast Bureau) would not violate Section 311(c) of the Communications Act of 1934, as amended. However, the Commission

2/ Before the Review Board are: (a) joint request for approval of agreement, grant of application of Victory Broadcasting Company, Inc., as amended, and dismissal of the other above-captioned applications, filed December 23, 1968, by Great River Broadcasting, Inc., Prudential Broadcasting Company, Six-Eighty-Eight Broadcasting Company, St. Louis Broadcasting Company, Victory Broadcasting Company, Inc., Home State Broadcasting Corp., Archery Broadcasting Corp., and Missouri Broadcasting, Inc.; (b) petition for leave to amend, filed with the Hearing Examiner by Victory Broadcasting Company, Inc. on January 15, 1969, and certified to the Review Board by Order, FCC 69M-70, released January 21, 1969; (c) opposition to joint request, filed February 3, 1969, by the Broadcast Bureau; (d) reply, filed February 25, 1969, by Great River Broadcasting, Inc., et al.; (e) additional reply, filed February 25, 1969, by Victory Broadcasting Company; (f) request for certification to the Commission, filed March 7, 1969, by Great River Broadcasting, Inc., et al.; (g) affidavit, filed March 18, 1969, by Six-Eighty-Eight Broadcasting Company; (h) correspondence relating to objections of Karin Broadcasting Company to approval of the joint request (see FCC 69-674, released June 19, 1969); and (i) Order of the Commission, FCC 69-674, released June 19, 1969. In an Order, FCC 69-744, FCC 2d, released July 3, 1969, the Commission denied a motion to stay this proceeding and for other relief, filed July 1, 1969, by Karin Broadcasting Company.

3/ The mutually exclusive applications of Pike-Mo Broadcasting Co. (Pike-Mo) and Salter Broadcasting Company (Salter) were dismissed in 1966 and 1967, respectively.

[3]

left for the consideration of the Review Board the remainder of the Broadcast Bureau's objections to reimbursement for certain out-of-pocket expenses claimed by the dismissing applicants. In the interest of clarity and expedition, we will consider the claims of each applicant in turn and the specific challenges made thereto by the Bureau.

3. Great River Broadcasting, Inc. The Bureau notes that, as part of Great River's claim for reimbursement of \$165,210.80, it lists legal expenses of \$9,370.25 as fees and disbursements of its St. Louis counsel, who is also a stockholder, director, and officer of the corporation. Under these circumstances, the Bureau objects to the fact that no separate retainer agreement has been submitted. In answer, and as part of the reply of petitioners, Great River presents a certified portion of the minutes of the May 22, 1965, meeting of its Board of Directors, which sets out the terms under which counsel was hired and which makes clear that the applicant's principal was to be paid only for his legal services, and not for time devoted to his corporate duties. Also submitted are copies of invoices of counsel's law firm which itemize the fees and disbursements involved. Therefore, the objection of the Bureau to the claimed legal expenses has been met and this item will

be approved. See Baltimore Broadcasting Company, 15 FCC 2d 857, 15 RR 2d 296 (1969). The Bureau also contends that the following expense items claimed by Great River (see Exhibit C-1, p. 2) have not been adequately explained or substantiated: miscellaneous engineering expenses (\$163.14); miscellaneous programming expense (\$210.00); Beverly Kastner survey (\$1,226.60); miscellaneous survey of radio listening habits (\$138.48); and miscellaneous office expenses (\$136.35). These items have now been adequately explained and substantiated by appropriate affidavits, invoices, etc., attached to the reply of petitioners, and their reimbursement will be allowed. Total reimbursement to Great River, therefore, will be allowed in the sum of \$165,210.80.^{4/}

4. Prudential Broadcasting Corp. Prudential claims total expenses of \$138,250.30, consisting of \$80,455.30 in alleged legitimate and prudent outlays incurred in the preparation, filing and advocacy of its application and \$57,795.00 in reimbursable outlays to RTEI. The

^{4/} This sum includes \$106,375.76 expended in the preparation and prosecution of its application and \$58,835.04 covering Great River's capital contribution and loans to RTEI and its pro rata share of the payments made to Pike-Mo., a former applicant, and to Richard P. Doherty, a broadcast consultant. The fee paid to Doherty, jointly advanced by all of the dismissing applicants herein, is reflected on the corporate books of RTEI as a "special purpose advance," a liability owing to the dismissing applicants. Under the circumstances, this expenditure will be treated in the same manner as the loans for which the Commission has already approved reimbursement, and we will require no further substantiation since Exhibit A of the joint petition, an affidavit of RTEI's treasurer, verifies the amount of the consultant's fee.

[4]

Bureau contends that the following claimed expenditures have not been adequately substantiated: attorneys' fees (Washington and Missouri counsel); surveys and programming expenses; and expenditures related to advisory board meetings (stenographic fees, etc.) ^{5/} Supporting affidavits and invoices have not been submitted which adequately justify and substantiate these expenses and they will be allowed. The Bureau also challenges the bulk of the \$20,000.00 claim for the services of James C. Laflin, a stockholder, director and officer of Prudential which were apparently voluntarily contributed to the interim operation by this dismissing applicant. The Bureau contends that these services are not reimbursable because they dealt with the organization and management of the interim operation. The \$20,000.00 paid to Laflin was authorized by Prudential at its 1968 annual stockholders' meeting and was predicated upon Laflin's "extraordinary amount of time and effort" which he had devoted not only to the corporate affairs of Prudential, but also to the activities of RTEI's board of directors. While Prudential has detailed the

services performed on its behalf by Laflin, it has not demonstrated that these services were either beyond the scope of Laflin's corporate responsibilities or rendered pursuant to a separate compensation agreement. Without such a showing, reimbursement to the extent that it contemplates payment to the dismissing applicant for the services of a corporate employee cannot be allowed. See Miss Lou Broadcasting Corp., 11 FCC 2d 589, 12 RR 2d 222 (1968). Moreover, it is not possible to distinguish the extent to which the compensation paid to Laflin was in return for the services rendered in connection with the interim operation. While the Commission, in its Order, concluded that reimbursement of the dismissing applicants' stock subscriptions and loans advanced to RTEI was not barred by Section 311(c) of the Act since such sums did not exceed the net worth of RTEI, it directed the Board to determine whether the remaining expenses for which reimbursement was sought, including the \$20,000.00 paid to Laflin, were legitimate and prudent outlays expended in connection with the preparing, filing and advocating of the dismissing applications. See Grand Broadcasting Co., FCC 65-415, 5 RR 2d 527. We do not believe that this expense comports with the standard enunciated in Section 311(c) (3) of the Act as an amount expended by an applicant "in connection with preparing, filing and advocating the granting of his application." Clearly, this language does not encompass expenses incurred in the operation of an interim permittee. Nor is there any indication that the compensation Prudential paid to Laflin represents a capital contribution or a loan advanced to the interim operation. Indeed, the corporate financial records of RTEI do not reflect as a liability accruing to Prudential any sum paid to Laflin in return for services rendered to RTEI. Under the circumstances, the Review Board cannot consider this expenditure or any part thereof as reimburseable and we will therefore approve reimbursement in a total amount of \$118,250.30.

5/ The Bureau also objects to the unsubstantiated fee of Richard P. Doherty. For the reasons previously indicated, the Board views this reimbursable items as adequately substantiated. See note 4, supra.

[5]

5. Six-Eighty-Eight Broadcasting Co. Six-Eighty-Eight claims total reimburseable expenses of \$166,573.84 which include \$57,795.00 advanced to RTEI and \$108,778.84 incurred in the preparation and prosecution of its application. The Bureau objects to the fact that there are no supporting affidavits for the legal fees of St. Louis counsel and for consulting fees and that there are no supporting factual allegations for the listed auditing and travel expenses. Six-Eighty-Eight has now supplied, with the reply pleading, an appropriate affidavit from its St. Louis counsel, which substantiates this expense and, therefore, this legal fee will be allowed. Six-Eighty-Eight claims a total of \$1,848.82 for the fees of consultants Ralph Bloomberg and Al Bland. However, in their respective affidavits Al Bland indicates that he incurred out-of-pocket expenses in the total amount of \$734.88 and Ralph Bloomberg alleges total expenses of \$185.00, for a total of only \$919.88. Therefore, \$928.94 of the applicant's claim for consultants' fees has not been

verified and will be disallowed. While the travel expenses (\$1,348.00) are adequately identified and substantiated in Exhibit C-3 of the petitioners' reply and will be allowed, the auditing fees of (\$400.00) are supported only by the affidavit of a director of Six-Eighty-Eight, even though it appears that an affidavit from the auditing firm would have been readily obtainable. The corporate director's affidavit does not constitute sufficient substantiation for this item, however, and reimbursement of the auditing fee will not be approved. Cf. Hartford County Broadcasting Corporation, 10 FCC 2d 597, 11 RR 2d 726 (1967). Reimbursement to Six-Eighty-Eight in the total amount of \$165,244.90 will be allowed.

6. Home State Broadcasting Corp. Home State claims expenses of \$107,553.88, including \$59,770.74 in subscriptions and loans to the interim corporation. The Broadcast Bureau contends that certain claimed travel expenses should not be allowed because they are related to the interim operation and that claimed long distance telephone charges require further substantiation showing a relationship between the calls and the Home State application as opposed to the interim operation. We agree with the Bureau that certain claimed travel expenses and telephone expenses are only related to Home State's participation in the interim operation and that, as such, they should be disallowed as reimbursable expenses. We do not believe that such expenses are allowable as being related to and in furtherance of Home State's application for permanent authorization. See Paragraph 4, supra. Therefore, we will reduce allowable travel expenses by \$3,902.73 and allowable telephone expenses by \$247.00. We will also only permit reimbursement of stock subscriptions and loans to RTEI in the total amount of \$58,120.74 even though the applicant claims \$59,770.74 in Attachment F of Exhibit C-4. Despite the applicant's claim, Exhibit A of the joint request discloses a list of the interim corporation's liabilities, as of November 30, 1968, which indicates, insofar as Home State's participation is concerned, a capital stock item of \$5,000.00, unsecured and secured advances of \$52,795.00 and \$325.74 for the Doherty advance, totaling \$58,120.74. The \$974.23 payment to the Emerson-Franzke Advertising Agency for services in conducting a programming survey, listed in Attachment E of Exhibit C-4 of the joint petition, has not been substantiated with appropriate affidavits and will, therefore, not be allowed. See KLRA, INC., 8 FCC 2d 366, 10 RR 2d 132 (1967). Total reimbursement to Home State will be allowed in the sum of \$100,779.92.

[6]

7. Missouri Broadcasting, Inc. Missouri claims total reimbursable expenses of \$183,662.41. The Broadcast Bureau notes that, in Appendix 4 of Exhibit C-6, St. Louis counsel concede that their legal fee includes amounts relating to Missouri's participation in the interim operation, and the Bureau contends that, in the absence of a substantiated breakdown between those charges relating to the Missouri application and those relating to the interim operation, the entire amount

should be disallowed. Subsequent to the Bureau's objection, Missouri submitted an additional affidavit from St. Louis counsel which indicates that \$9,460.00 of the legal fee represented charges for services rendered in connection with Missouri's participation in the interim operation. For the reasons previously stated, this \$9,460.00 legal fee will be disallowed. Missouri will be allowed total reimbursement of \$174,202.41.

8. St. Louis Broadcasting Company. St. Louis claims total reimburseable expenses of \$100,157.94. The Bureau contends that, with the exception of the fees paid for Washington legal and engineering services and the items of "Secretary of State, Missouri" and "Director of Revenue-franchise tax," none of St. Louis' expenses is adequately substantiated. In reply, St. Louis submits four affidavits of its secretary-treasurer, who gives details of the sums paid to Harold C. Sundberg as a consultant in connection with the preparation of St. Louis' application; to Peters Marketing Research, Inc., for a market and listening survey; to Raymond Rohrer and Associates, for engineering services; and to the Clayton Inn of Clayton, Missouri, for the use of its motel facilities for a stockholders' discussion of the application. St. Louis also submits an affidavit of its president, who recites details of the payment to Martin and Associates for locating and obtaining a transmitter site, and an affidavit of a partner of St. Louis counsel concerning that firm's fee. With the exception of the affidavits dealing with the \$123.00 payment to the Clayton Inn and the \$15,000.00 fee of St. Louis counsel, both of which constitute sufficient support for those expenses, none of the affidavits submitted by St. Louis with petitioners' reply adequately substantiates the challenged items since they merely represent the sworn statements of the applicant's principals rather than the sworn statements of the firms involved. See Baltimore Broadcasting Company, supra; R. Edward Ceries, 15 FCC 2d 772, 15 RR 2d 85 (1968); KRLA, Inc., supra. Therefore, with the exceptions noted above, the capital contribution and loans to RTEI, and the payment to Salter Broadcasting Company, none of St. Louis' claimed expenses will be allowed. St. Louis will be allowed total reimbursement of \$92,191.63.6/

6/ The claimed expense for engineering services of Kear and Kennedy has been modified to reflect the figure which is contained in Exhibit C-8 \$3,171.14. Consistent with our procedure herein, we have adopted the figures appearing in Exhibit A reflecting the loans and advances made to RTEI by the dismissing applicants, which reflect St. Louis' participation in the total amount of \$36,000.00. We have also allowed the sums
(Con'd on next page)

[7]

9. Archway Broadcasting Corporation. The Commission, in its Order (FCC 69-674, released June 19, 1969), rejected the argument of the Broadcast Bureau that reimbursement of Archway should be limited to the extent that its expenses exceed its equity in Vic-Way. However, the

Bureau further contends that, even assuming Archway is entitled to some reimbursement, it has failed to justify the following items of its total claim for \$99,365.50: salary - R.H. Herseth; fee of consulting engineer; legal fee of Washington counsel; consultant fee - P. Mack; fee to Boyle-Priest; auditing fee; consulting radio fees; office expense; payroll taxes, miscellaneous expenses; and legal fees of St. Louis counsel. In reply, Archway submits an affidavit of its Secretary, Glennon R. Vatterott, who identifies and explains the above expenses. Of the items discussed in Mr. Vatterott's affidavit, the expenses for payroll taxes, miscellaneous items, the legal fee of the St. Louis firm (of which Mr. Vatterott is a partner), and the radio consulting fee of R.P. Doherty have been adequately justified and substantiated and will be allowed. The \$29,543.13 payment to R.H. Herseth for various services in prosecuting Archway's application has now been substantiated by a supporting affidavit by Mr. Herseth and it will be allowed. However, all of the other items objected to by the Broadcast Bureau require more substantiation than the mere recitals in the affidavit of Mr. Vatterott. No affidavits have been submitted from the various creditor firms and individuals involved. Therefore, none of the above expenses, with the noted exceptions, will be allowed. Archway will be permitted reimbursement in the total sum of \$96,386.49.

10. ACCORDINGLY, IT IS ORDERED, That the joint request for approval of agreement, grant of application of Victory Broadcasting Company, Inc., as amended, and dismissal of the above-mentioned applications, filed December 23, 1968, by the eight above-captioned applicants IS GRANTED; that to the extent indicated above,^{7/} the agreement IS APPROVED; that the applications of Great River Broadcasting, Inc.

^{6/} (Cont'd from preceding page) of \$714.30 and \$325.74 which represent payments made by St. Louis for the Pike-Mo reimbursed dismissal and for the consultant services of Richard P. Doherty.

^{7/} In Paragraph 2(a) of the joint agreement of November 2, 1968, each applicant herein agrees to be bound by the Commission's determination of legitimate and prudent out-of-pocket expenses incurred in the preparation, filing and prosecution of its respective application. As a result, there is no need to submit the Board's determinations of the specific sums for which reimbursement can be permitted to those parties affected by the disallowance of one or more expense items. See footnote 5 of FCC 69-674, released June 19, 1969. The Board's modification of claimed reimbursement of a dismissing applicant's stock subscriptions and loans to RTEI (as in the cases of Home State Broadcasting Corp. and St. Louis Broadcasting Company) should not be interpreted to invoke the provisions of Paragraph 2(d) of the joint agreement, which

(Cont'd on next page)

(BP-16749), Prudential Broadcasting Company (BP-16752), Six-Eighty-Eight Broadcasting Company (BP-16753), St. Louis Broadcasting Company (BP-16755), Home State Broadcasting Corporation (BP-16759), Archway Broadcasting Corporation (BP-16761), and Missouri Broadcasting, Inc. (BP-16763) ARE DISMISSED with prejudice; that the application of Vic-Way Broadcasting Company (BP-16758) IS GRANTED subject to the following conditions and that this proceeding IS TERMINATED:

1. All towers of the directional antenna system are to be series excited.
2. Subject to permittee, prior to any construction, obtaining FAA approval of the antenna structure, and compliance by permittee with any applicable procedures of the FAA.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

7/ (Cont'd from preceding page) accords any applicant who is denied full payment for its stock subscriptions and loans to RTEI the option of avoiding the agreement. Any modification of such payment merely reflects the Board's primary reliance on those figures appearing in Exhibit A of the joint request which represent a list of the liabilities and obligations of RTEI taken from the corporate books of the interim corporation, as of November 30, 1968. Similarly, the Board's disposition of this proceeding herein assumes the continued effectiveness of the joint agreement in spite of the provision of Paragraph 4 thereof, which provides for termination of contractual liability in the event the Commission has not favorably acted on the joint request, by final order or orders, within 180 days after the date of filing the joint request. No party to the agreement has indicated that it would invoke such provision.

[1]

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

B
FCC 69R-400
38258

In re Applications of)
)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
)
et al.)

MEMORANDUM OPINION AND ORDER
Adopted October 1, 1969; Released October 2, 1969

By the Review Board: Board Member Berkemeyer abstaining.
Board Member Nelson not participating.
Board Member Kessler absent.

1. This proceeding, which was designated for hearing by Order released February 21, 1967,^{1/} involves the eight remaining mutually exclusive applications for a permanent authorization to operate a standard broadcast station on the former Station KWK frequency (1380 kHz) at St. Louis, Missouri. On December 23, 1968, the eight applicants filed a joint request with the Review Board, seeking approval of an agreement which contemplates: (1) the dismissal of seven of the applications; (2) the grant of the application of Victory Broadcasting Company, Inc. (Victory), as amended, to reflect a merger between Victory and Archway Broadcasting Corporation (Archway); and (3) the reimbursement by the new corporate entity, Vic-Way Broadcasting Company (Vic-Way), of the dismissing applicants for expenses incurred by them in the preparation, filing, and prosecution of their respective applications and for capital contributions and loans to Radio Thirteen Eighty, Inc., interim permittee of the former KWK facilities. Pursuant to a March 7, 1969, request by Victory and Archway, the Board, by Order, FCC 69R-174, released April 22, 1969, certified the joint request, along with other petitions and documents, to the Commission. On June 19, 1969, the Commission released an Order,^{2/} which, among other things, granted the joint request subject to the Board's determination concerning the amount of allowable reimbursement for specific out-of-pocket expenses, and referred the proceeding to the Board for further action consistent with its Order. By Memorandum Opinion and Order released July 10, 1969,^{3/} the Board considered the

1/ FCC 67-225, 2 FCC 2d 809, 9 RR 2d 577.

2/ FCC 69-674, 16 RR 2d 669.

3/ FCC 69R-293, 18 FCC 2d 592, 16 RR 2d 840.

[2]

reimbursement claims of the parties in light of the Broadcast Bureau's objections to certain expense items. Among other things, the Board refused to permit reimbursement for certain expenditures allegedly incurred by St. Louis Broadcasting Company (St. Louis), Home State Broadcasting Corporation (Home State), and Six-Eighty-Eight Broadcasting Company (Six-Eighty-Eight). See paragraphs 5, 6, and 8, of the Board's Memorandum Opinion and Order, 18 FCC 2d at 595-597, 16 RR 2d at 844-846. Presently before the Board is a joint petition for partial reconsideration of the Board's Memorandum Opinion and Order, filed by St. Louis, Home State, and Six-Eighty-Eight, on August 8, 1969, in which petitioners request the Board to reconsider the disallowance of certain expenses allegedly incurred by them.^{4/}

2. In support of their request, petitioners submit that they had previously supported the claimed expenses by affidavits of their principals; that there was "no substantial question as to the propriety of the claims"; and that the claims were rejected by the Board solely on the ground that they were not also supported by affidavits from the recipients of the payments. Petitioners further claim that all of the items disallowed by the Board are "of the type which normally would be allowed except for the purely 'mechanical' matter of presenting the affidavit of the recipient." Consequently, petitioners state, they have obtained affidavits and certificates from the payees involved confirming the receipt of the payments for work done in connection with the applications in question. The affidavits and certificates are attached to the joint petition.^{5/} The Broadcast Bureau opposes the request on the general grounds of administrative finality and timeliness. The Bureau maintains that the petitioners had from December 23, 1968, until July 10, 1969, to support their claimed expenses and that their failure to do so warrants denial of the joint petition.

^{4/} The following related pleadings are also before the Board: (1) opposition, filed September 2, 1969, by the Broadcast Bureau; (2) reply, filed September 11, 1969, by St. Louis; and (3) reply, filed September 12, 1969, by Home State.

^{5/} Eight affidavits substantiating reimbursable claims totaling \$10,681.43 are attached to the joint petition. Reimbursement is sought by St. Louis for: (1) \$2,500 for consultant fee; (2) \$4,026.52 for market and listener survey work; (3) \$892.48 for engineering work; and (4) \$1,000 for services rendered in locating a site and obtaining options thereon. Home State seeks reimbursement for \$974.23 for listener preference survey services. Six-Eighty-Eight requests reimbursement for: (1) \$888.20 for consultant fee; and (2) \$400 for auditing services (two affidavits).

[3]

3. While we do not necessarily agree with all of the arguments advanced by the petitioners in support of their instant petition, we will grant their request for partial reconsideration and allow the reimbursement of expenses in the amount of \$10,681.43, as originally contemplated by the agreement of all of the parties and as substantiated by the several affidavits attached to the joint petition. See TVue Associates, Inc., 6 FCC 2d 833, 9 RR 2d 379 (1967). Reimbursement for these expenses would have been allowed in our July, 1969 Memorandum Opinion and Order, had the petitioners in December, 1968, or afterward, submitted the particular substantiating affidavits and certificates now before us. The expense items in question (see note 5, supra) have now been shown to be legitimate and prudent expenditures made in connection with the preparation, filing and prosecution of the applications of the three petitioners.

tioners, as required by Section 1.525 of the Commission's Rules. It may be noted that no one would be injured by the relief requested by the petitioners. Rather, by granting the joint petition and allowing the reimbursement of expenses, we are merely implementing the agreement of the parties which was found by the Commission to have been in the public interest.

4. ACCORDINGLY, IT IS ORDERED, That the joint petition for partial reconsideration of July 10, 1969 Memorandum Opinion and Order, filed on August 8, 1969, by St. Louis Broadcasting Company, Home State Broadcasting Corporation, and Six-Eighty-Eight Broadcasting Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

[1]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69M-1267
38349

In re Applications of)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
et al.)

O R D E R

Adopted October 2, 1969; Released October 6, 1969

1. The Commission considered a request filed August 12, 1969, by the Chief, Broadcast Bureau, for an extension of time within which to respond to a motion for temporary stay and a petition for reconsideration and application for review, both filed August 4, 1969, by Karin Broadcasting Company.

2. IT APPEARS, That the Bureau's request is now moot in view of the Commission's actions herein, FCC 69-911, released August 20, 1969, and FCC 69-1056, adopted October 1, 1969, denying Karin's requests.

3. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.371(b) of the Commission's Statement of Delegation of Authority, that the request for extension of time, filed by the Chief, Broadcast Bureau, on August 12, 1969, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Leonidas P. B. Emerson, Chief
Office of Opinions and Review

[1]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69-1056
37114

In re Applications of)
)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
)
et al.)

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 1969; Released: October 6, 1969

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Cox concurring in the result; Commissioner H. Rex Lee absent.

1. By our Order, FCC 69-674, 18 FCC 2d 212, released June 19, 1969, we granted the joint request for approval of agreement filed by the eight applicants for the former KWK facility in St. Louis, Missouri. The order contemplated the grant of the application of Victory Broadcasting Company, Inc., as amended to reflect a merger of Victory and Archway Broadcasting Corporation into a new corporation, Vic-Way Broadcasting Company. The applicants' agreement also provided for each dismissing applicant to be reimbursed for its contributions to Radio Thirteen Eighty, Inc. (RTEI), the interim operator of Station KWK.^{1/} On the basis of a verified appraisal of RTEI's leasehold real estate interest, indicating a value in excess of \$500,000, we allowed the proposed reimbursement and referred other requests for reimbursement of out-of-pocket expenses to the Review Board. Thereafter, the Board, inter alia, permitted certain reimbursements and terminated this proceeding, FCC 69R-293, 18 FCC 2d 592, released July 10, 1969.

1/ The agreement also contemplated that control of RTEI would be

transferred to Victory and Archway, and our general affirmance of that agreement included, inter alia, approval of the transfer of the stock interests. Thus we consented to the transfer of control of RTEI to Victory and Archway which took place on July 25, 1969.

[2]

2. Now before us is a Petition for Reconsideration and Application for Review,^{2/} filed August 4, 1969, by Karin Broadcasting Company, which is a corporation comprised of a majority of RTEI's employees. Karin initially argues that the financial showing concerning the value of RTEI's leasehold interest is deficient. Karin asserts that it has obtained a sworn and verified appraisal, indicating that RTEI's leasehold interest is worth only \$129,000. Karin thus claims that there is now a serious question as to whether RTEI's net worth is sufficient to reimburse all of the applicants' contributions. Karin also contends that the value of RTEI's assets should be reduced in view of the facts: (a) that claims have been made to tax authorities in St. Louis that the entire interest in the land is worth substantially less than \$500,000; (b) that the owner of one parcel of land claims ownership of KWK's radio towers and ground system; and (c) that the lessors deny the assignability of RTEI's leases. Finally, Karin alleges that Vic-Way is not a legally constituted Missouri corporation and that it is a new applicant which must comply with all of the requirements for a licensee.^{3/}

3. RTEI, Vic-Way, Archway, and Victory initially claim in their joint opposition that Karin's petition is procedurally defective and that it should be dismissed without further delay.

^{2/} On August 18, 1969, an Opposition to Petition for Reconsideration and Application for Review and Request for Immediate Dismissal Thereof was jointly filed by RTEI, Vic-Way, Archway and Victory. On August 28, 1969, Karin filed a reply to the opposition. In response to a staff request, a letter was filed by Victory on September 9, 1969, enclosing copies of RTEI's leases, an opinion of St. Louis legal counsel concerning the assignability of one lease, and certain documents relating to a civil action in St. Louis against Karin; a letter was filed by Karin on September 10, 1969, enclosing a copy of one lease and a deposition of Clifton W. Gates, President of both Victory and RTEI; and a letter was filed by Victory on September 12, 1969, in response to Karin's letter. In addition, on September 11, 1969, Karin filed a Supplement to its Petition for Reconsideration and Application for Review; Victory filed an opposition thereto on September 15, 1969; and Karin filed a reply on September 24, 1969.

^{3/} Although Karin also urges that certain unfair labor practices have taken place in connection with the operation of KWK and that Vic-Way's proposed transmitter site is not available, these matters are

founded on unsubstantiated allegations unrelated to our approval of the applicants' joint agreement. Accordingly, we are convinced that these matters can be adequately considered at a later date if it becomes appropriate to do so.

[3]

In response to Karin's contentions, the opponents assert that the leases are assignable in a manner consistent with RTEI's appraisal and that, while one lessor has a security interest in the leasehold improvements, the lessors do not have any ownership interest in these assets. The opponents next contend that Vic-Way is a legally constituted Missouri corporation, that Karin has had ample opportunities to participate in this proceeding, and that Karin's present objective is simply to obstruct this merger agreement. Turning to Karin's allegations concerning the validity of RTEI's appraisal, the opponents assert that any real estate valuation is a matter of judgment and expertise, that differences of opinion are to be expected, but that the appraisal submitted by RTEI was made in good faith.

4. According to the opponents, the following differences between the two appraisals demonstrate the defects of Karin's position: (a) Karin's appraisal fails to include 36,992 square feet of land which is part of the leasehold and which was included in RTEI's appraisal; (b) Karin's appraisal gives no value to leasehold improvements, including KWK's studio and radio towers, whereas RTEI's appraisal estimates that these items have a value of \$105,045; ^{4/} (c) Karin's appraisal estimates the land value at \$0.15 less than the \$0.90 per square foot in RTEI's appraisal, which amounts to approximately \$66,000 less for the entire leasehold interest; (d) Karin's appraisal uses a discount and rental rate of 8%, while RTEI's appraiser claims that 9% is more representative of today's market conditions; and (e) Karin's appraisal improperly attempts to determine the value of the leasehold interest by deducting the value of the lessor's remaining interest from the market value of the land and by treating rents as payable in arrears, while they are actually payable in advance.

^{4/} Since the leasehold improvements, to the extent that RTEI has an ownership interest, have already been included on its balance sheet, they cannot properly be credited with any additional value. By the same token, RTEI is not entitled to claim the value of the building which it has leased in connection with its leasehold interests. Nonetheless, we previously found that RTEI's assets exceeded its liabilities by more than \$172,000. Thus, even if the item, leasehold improvements, listed on RTEI's balance sheet is assumed to be limited to the leased building, the reduction of RTEI's assets by the amount of that item, \$8,783.99, and by an additional \$105,045 would not preclude RTEI from reimbursing the dismissing applicants for their contributions to the interim operation.

5. In reply, Karin asserts that there are doubts concerning Vic-Way's ability to initiate permanent operation of KWK at the earliest possible time and as to whether or not the public interest is truly being served by authorization of KWK to Vic-Way. Karin also urges that RTEI's leases are not assignable, that one of the lessors is taking steps to evict Vic-Way from the land, and that the land thus has no leasehold value for RTEI. In view of the differences in the appraisals of RTEI's leasehold interest, Karin finally contends that a third appraisal should be made by an independent party to determine whether RTEI's financial showing was deficient.

6. Initially, it must be noted that the questions raised in Karin's present petition relate to matters which we considered and resolved in our order released on June 19, 1969. While our action was founded upon extensive pleadings, including certain objections of the Broadcast Bureau to the approval of the applicants' agreement, Karin did not at that time seek to intervene in this proceeding, nor did it attempt to point out any deficiencies in the agreement. Since it has not shown good reason why it was not able to participate in the earlier stages of this proceeding and promptly present its contentions concerning the reimbursement agreement as required by Section 1.106(b) of our Rules and since it has never established that it should be made a party to this proceeding, we are convinced that Karin's present petition is procedurally defective and that it could be dismissed. See Spanish International Broadcasting Co. v. Federal Communications Commission (C.A.D.C., 1967), 385 F. 2d 615, 9 RR 2d 2053; and Springfield Television Broadcasting Corp. v. Federal Communications Commission (C.A.D.C., 1964), 328 F. 2d 186, 1 RR 2d 2083. Nonetheless, in light of the serious public interest questions raised by Karin, we believe that these questions should be resolved on the merits.

7. While the appraisals of RTEI and Karin differ on their faces with respect to the value to be ascribed to RTEI's leasehold interest, the opponents have provided a detailed explanation of certain distinctions in the methods by which the appraisals were prepared. In view of the fact that each appraisal is inherently a matter of judgment and expertise, it is not surprising that two separate efforts would arrive at different conclusions. For this reason, we do not believe that any useful purpose would be served by a further attempt to evaluate this real estate interest. Since there is no evidence in the present record that RTEI's appraisal was not made in good faith, we are convinced that RTEI's financial showing is sufficient to reflect its net worth fairly and adequately.

8. In connection with Karin's assertion that RTEI's leases are not assignable, we have examined copies of those documents. While we would not attempt to determine all of the parties' rights under Missouri law, we are persuaded that the terms of the leases provide a strong basis for the opponents' contention that they are assignable. Both leases are for a term of twenty years and are

renewable at the option of the lessee for an additional twenty years. One lease specifically provides that the lessee shall have the right to assign or sublet at any time during the term of the lease. The other lease provides that the lease is assignable to the applicant or applicants which are granted a permit and license by this Commission.^{5/} Moreover, although the lease provides that it shall not be assigned without the lessor's express written consent, the lessor has specifically agreed not to withhold such consent unreasonably. Thus, it appears that RTEI could assign both leases or, since neither lease contains a restriction against subletting, that RTEI could sublet its leasehold interests. Under these circumstances, we are convinced that these leasehold interests were properly included in our assessment of RTEI's net worth.

9. With respect to the remainder of its assertions, Karin has failed to support its contention with sufficient allegations of fact to raise a substantial and material question concerning our approval of the applicants' joint agreement. Karin's unsupported assertions are not sufficient to establish that the opponents have failed to comply with any appropriate requirement or that our consideration of this matter has been deficient in any way. Under these circumstances, the public interest will be best served by permitting the opponents to proceed expeditiously with their efforts to provide a permanent operation for Station KWK and by denying Karin's present petition.

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration and Application for Review filed August 4, 1969, by Karin Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple
Secretary

^{5/} While Victory did not sign this lease until July, 1969, we do not believe that this fact would be an impediment to an assignment in view of the precise terms of the lease permitting assignment to the winning applicant, whether or not it had participated in the interim operation

* See attached Dissenting Statement of Commissioner Robert T. Bartley.

[1]

DISSENTING STATEMENT OF
COMMISSIONER ROBERT T. BARTLEY

I voted against the approval of the joint agreement and grant of Vic-Way's application, 18 FCC 2d 212, for the reason, among others, that Vic-Way had not established its financial ability to pay off the withdrawing applicants.

The data before us on reconsideration further raise, in my opinion, substantial and material questions of fact as to that financial ability, which should be resolved, pursuant to Section 309(e) of the Communications Act, in an evidentiary hearing. Vic-Way has submitted a verified appraisal of real estate interests in excess of \$500,000; Karin, the petitioner herein, has submitted a verified appraisal of those interests as worth only \$129,000. The appraisals are too disparate for me to find that either is conclusive on the record now before us.

Also, there is an unresolved question of whether Vic-Way has reasonable assurance that its proposed site will be available; and an unsatisfactorily resolved question of whether there has been an unauthorized transfer of control of RTEI by the actions of Victory and Archway because, contrary to the statement in footnote one, the Commission did not, I believe, consent to a transfer of control since it could not, pursuant to Section 310(b) of the Act, "except upon application to the Commission", and no such application has been filed for the Commission to act upon. Thus, while the agreement may have "contemplated" a transfer of control (upon proper application and grant by the Commission), the Commission's "general affirmation" of the agreement merely recognized that contemplation but could not include approval of an non-existent application for transfer, and to say now that it did is, in my opinion, reversible error.

[1]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

B
FCC 69-1327
40237

In re Application of)
)
GREAT RIVER BROADCASTING, INC.) * * * *
St. Louis, Missouri)
)
et al.)

O R D E R

Adopted: December 3, 1969; Released: December 8, 1969

By the Commission: Commissioner Burch, Chairman; and Wells not participating; Commissioner Bartley dissenting and issuing a statement; Commissioner Cox concurring in the result.

1. This matter arises from the joint agreement of the eight applicants for the former KWK facility in St. Louis, Missouri, which we approved on June 18, 1969, FCC 69-674, 18 FCC 2d 212. Subsequently, Karin Broadcasting Company, a corporation comprised of a majority

of the employees of the interim operation, sought reconsideration, which was denied by our Memorandum Opinion and Order, FCC 69-1056, 19 FCC 2d 934, released October 6, 1969. Now, in a letter filed November 3, 1969, 1/ Karin asserts that it has filed a notice of appeal of this proceeding in the United States Court of Appeals for the District of Columbia, but that it wishes to be certain that it has exhausted all administrative remedies before it requests temporary relief from the Court. Karin thus urges that its letter should be treated as a motion for stay, a motion for reconsideration, and/or for any other relief which may be deemed appropriate.

1/ The letter was signed by Jerome J. Duff on behalf of Karin. On November 10, 1969, a letter in opposition was submitted by Victory Broadcasting Company, Inc., Archway Broadcasting Corporation, Vic-Way Broadcasting Company, and Radio Thirteen Eighty, Inc.

[2]

2. Karin seeks a stay from the Commission because Rule 18 of the Federal Rules of Appellate Procedure provides that: "Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." The major purpose of a stay pendente lite is "to save the public interest from injury or destruction while an appeal is being heard," Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 15 (1942). Thus, even a showing of substantial private harm is not sufficient where the public interest would be impaired by a grant of the stay. Yakus v. United States, 321 U.S. 414, 440 (1944). Here it does not appear that the Commission's order results in substantial injury to Karin, whereas the relief it seeks would in our view be harmful to the public interest.

3. In its letter of November 3, 1969, Karin has made no showing of irreparable injury to itself or to the public. In fact Karin does not even discuss this essential condition precedent to relief. Instead it simply repeats its demand for "immediate termination of interim authority" and "immediate revocation of Vic-Way's construction permit" (pp. 2-3). It is thus clear that Karin does not seek to maintain the status quo pending review. On the contrary it seeks to terminate an operation which was authorized specifically for the purpose of maintaining service pending the selection of a regular licensee. Beloit Broadcasters, Inc. v. F.C.C., 125 U.S. App. D.C. 209, 365 F. 2d 962 (1966). Karin has not shown how a grant of its request for relief would prevent irreparable injury to itself and, more important, to the listening public. We think it clear that, on the contrary, the public interest would be hurt by a grant of the relief requested.

4. In large part Karin's letter reargues questions which have previously been considered and rejected by the Commission.^{2/} We have reconsidered the allegations and again conclude that the action we have taken serves the public interest and is otherwise proper. We note in this connection that Karin

^{2/} Great River Broadcasting, Inc., 18 F.C.C. 2d (1968); 18 F.C.C. 2d 592 (Review Board, 1969); FCC 69-744, July 3, 1969; 19 F.C.C. 2d 934 (1969). Accordingly, "rehearing will not be granted merely for the purpose of again debating matters" on which we have previously ruled. WWIZ, Inc., 37 F.C.C. 685 (1964).

[3]

complains about our failure to comment upon certain aspects of the proposed Vic-Way operation. The Vic-Way proposals were before the Commission and were considered at the time the merger agreement was approved. Karin's assertions remain insufficient to establish that there has been a violation of any appropriate Commission requirement or that our consideration of this matter has been deficient in any way. As we have previously pointed out, (Great River Broadcasting, Inc.), FCC 69-744, released July 3, 1969) the Commission has approved such agreements, where, as here, they result in the selection of a qualified applicant whose proposals are found to serve the public interest, thus terminating litigation and hastening the institution of service on a regularized basis.

5. ACCORDINGLY, IT IS ORDERED, That Karin Broadcasting Company's request for relief made in its letter filed November 3, 1969, is denied in all respects.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple
Secretary

*See attached Dissenting Statement of Commissioner Robert T. Bartley.

[1]

DISSENTING STATEMENT OF
COMMISSIONER ROBERT T. BARTLEY

I dissent.

The holding that "In large part Karin's letter reargues questions which have previously been considered and rejected by the Commission" (underscoring added) is, in my opinion, error.

The threshold legal question is whether the petitioner has made new factual allegations in support of its instant request which require Commission consideration and an order enunciating its reasons for rejection of the various allegations.

The Commission certainly has not issued such a reasoned order.

The petitioner has made what I consider new factual allegations, namely:

"There are now three corporations, Vic-Way, Victory and Archway, involved in the ownership management and control of Radio 1380, Inc., instead of one, Vic-Way, as intended."

* * * *

"Archway, a paid off and dismissed applicant, which at least was to own 25% of Vic-Way, now finds itself as a 50% owner of the interim permittee, Radio 1380, Inc., which will probably be compelled to remain in business for at least two more years unless its authority is revoked."

* * * *

"The programming format approved in December, 1965, in Radio 1380's application has been totally and drastically revised by Victory and Archway since August, 1969, without any effort to amend the Radio 1380 application or to obtain the requisite F.C.C. approval."

* * * *

[2]

"The Ford Foundation loan of \$500,000.00 was granted to Vic-Way with the proviso that certain profits from the operation of KWK be used as capital to foster black enterprises in the St. Louis area."

* * * *

"The predicate upon which the Vic-Way settlement ultimately came to rest was a dire need to prove the solvency of Radio 1380, Inc., in order to justify reimbursement of all advances to it by the withdrawing stockholders. The proof offered was an evaluation of the Radio 1380, Inc., leasehold interests amounting

to \$500,000.00. Karin's effort to point up the absurdity of this evaluation was duly ignored. It now appears obvious that the \$500,000.00 evaluation will soon be reduced to minus zero by reason of the landlady's re-possession of the very property for which the preposterous (sic) leasehold claim was made."

* * * *

A response to these allegations was filed jointly by Victory, Archway, Vic-Way and Radio 1380. In my opinion, the response does not resolve matters raised by the petition.

Accordingly, I would grant reconsideration.

[1]

Law Offices
LAUREN A. COLBY

July 23, 1969

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

In Re: Great River Broadcasting Company, et al, Docket No. 17210, et al and Radio 1380, Inc., Interim Operator of Station KWK, St. Louis, Missouri

Dear Mr. Waple:

In an Order released June 19, 1969, the Commission granted a joint request for approval of the Settlement Agreement in the subject Great River et al proceeding and, in connection therewith, granted the application of Victory Broadcasting Company, Inc., as amended, and dismissed all of the other applications in said proceeding.

The settlement agreement approved by the Commission requires that, on the closing date, all of the competing applicants except Victory Broadcasting Company, Inc., and Archway Broadcasting Corporation, be paid, in addition to other considerations, the amount of money actually paid by each of such applicants for the purchase of stock in Radio 1380, Inc., the authorized interim operator of Station KWK, St. Louis, Missouri. When these applicants are paid for their RTEI stock purchases, it is expected that their respective shares will be retired, thereby leaving the control of RTEI

in Victory Broadcasting Company, Inc., and Archway Broadcasting Corporation. A similar change of control of RTEI received prior approval of the Commission at the time RTEI was granted the interim authorization. See Agreement of subscribing stockholders (paragraphs 6 and 7), executed May, 1965.

[2]

Since the Commission's approval of the joint settlement agreement and its grant of the application of Victory Broadcasting Company, as amended (among other things to specify Vic-Way Broadcasting Company as the applicant), became final within the meaning of the settlement agreement on July 22, 1969, the closing date and the date that Victory and Archway assume control of RTEI, will be July 25, 1969.

Vic-Way Broadcasting Company will proceed extraditiously to construct and ready for operation the new facilities authorized by the Commission's June 19, 1969, action. When (or before) program tests with those facilities have been authorized by the Commission, RTEI will notify the Commission to terminate its interim authorization for the operation of an AM broadcast station on 1380 kc at St. Louis, Missouri.

Since the Commission has approved both the settlement agreement and the May, 1965, interim agreement, it is assumed that no further approvals for the above described transaction are required. However, if there are any questions, or if additional information is desired, please advise the undersigned.

Very truly yours,

By /s/ Richard J. Tarrant

Lauren A. Colby (by Richard J. Tarrant
Attorney for Victory Broadcasting Co. Inc.

By /s/ Edward F. Kenehan

Edward F. Kenehan
Attorney for Archway Broadcasting Corp.

LAC/ads

[3]

cc: * * * *

BRIEF FOR APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NO. 23,608

KARIN BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VICTORY BROADCASTING COMPANY,
ARCHWAY BROADCASTING CORPORATION, and
VIC-WAY BROADCASTING COMPANY,

Intervenors.

APPEAL FROM ORDER OF FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

JEROME J. DUFF
721 OLIVE STREET,
ST. LOUIS, MISSOURI, 63101.

FILED JUL 29 1970

ROGER M. HIBBITS
9953 LEWIS & CLARK BOULEVARD,
ST. LOUIS, MISSOURI, 63136.

Nathan J. Paulson
CLERK

COUNSEL FOR APPELLANTS.

Statement of Issues Presented

1. May the Federal Communications Commission grant interim authority when there is no showing that "extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest", for an indefinite period of time which could and does exceed the maximum period of time for any license permitted by statute?
2. May the Federal Communications Commission grant a construction permit based upon approval of an amended application, where such application was amended substantially and no notice was given to the public regarding such amendment as required by statute?
3. May the Federal Communications Commission approve a settlement agreement subject to a future determination by the Review Board concerning proposed reimbursements to dismissing applicants, especially when it knows that certain proposed reimbursements are illegal?
4. May the Federal Communications Commission approve a settlement agreement where the ability of the remaining applicants

to pay off withdrawing applicants has not been established, the availability of the proposed site has not been established, no finding of public interest, convenience and necessity has been established and it has not determined that there is a bona fide merger of competing interests.

5. When evidence submitted by an interested member of the public demonstrates repeated willfull violation of law and of well established Commission rules should the Commission hold evidentiary hearings thereon and should the burden of proof in such Commission proceeding as to the applicant's conduct be on the applicant?
6. May the Federal Communications Commission confirm or ratify a prior unauthorized transfer of control of an interim operation?

This case has previously been before this Court upon a "Motion to Stay" filed by appellants, requesting this Court to stay the proceedings before the Federal Communications Commission, pending hearing of this matter by this Court on the merits.

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BRIEF FOR APPELLANTS

In The

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 23,608

KARIN BROADCASTING COMPANY, Appellant,
vs.
FEDERAL COMMUNICATIONS COMMISSION, Appellee,
VICTORY BROADCASTING COMPANY
ARCHWAY BROADCASTING CORPORATION, and
VIC-WAY BROADCASTING COMPANY, Intervenors.

JURISDICTIONAL STATEMENT

This case is before this Court upon appeal by the Karin Broadcasting Company (the "appellant"), pursuant to Section 402(b) of the Communications Act of 1934, as amended, for review of Memorandum Opinions and Orders of the Federal Communications Commission (the "FCC" of the "Commission") released June 19, 1969, October 6, 1969 and December 8, 1969

REFERENCES TO RULINGS

FCC memorandum Opinion and Order, FCC 65 - 612, released, July 6, 1965.

FCC Order, FCC 65 R - 341, released, Sept. 15, 1965.

FCC Memorandum Opinion and Order, FCC 65 - 1157, released, Dec. 27, 1965.

FCC Order, FCC 66 - 374, released, Apr. 28, 1966.

FCC Memorandum Opinion and Order, FCC 69 R - 174, dated Apr. 22, 1969.

FCC Order, FCC 69 - 674, released, June 19, 1969.

FCC Order, FCC 69 - 744, released, July 3, 1969.

FCC Order, FCC 69 - 911, released, Aug. 20, 1969.

FCC Memorandum Opinion and Order, FCC 69 R - 400, released, Oct. 2, 1969.

FCC Order, FCC 69 R - 1267, released, Oct. 6, 1969.

FCC Memorandum Opinion and Order, FCC 69 - 1056, released, Oct. 6, 1969.

FCC Order, FCC 69 - 1327, released, Dec. 8, 1969.

STATEMENT OF THE CASE

On May 27, 1963, the Commission revoked the license of KWK, a standard broadcast station in St. Louis, Missouri, operating on the frequency of 1380 KHZ. An appeal was had from said revocation and the U.S. Supreme Court denied certiorari on March 1, 1965.

Thereafter on April 1, 1965, the Commission by Commissions Public Notice, FCC 65-260, outlined the procedure for considering applications for the frequency to be vacated by station KWK which was scheduled to discontinue operation at the end of the day on Sept. 30, 1965. Thereafter, several applicants filed applications for permanent authority and also for interim authority to operate on the frequency vacated by station KWK.

Thereafter by Memorandum Opinion and Order, FCC 65-612, released July 8, 1965, the Commission designated the applications for interim authority for oral argument before the Review Board on the following issues:

1. To determine whether interim operation would serve the public interest, convenience and necessity.
2. If the foregoing issue is decided affirmatively, to determine which, if any, of the applicants, as existing or amended, for interim operation should be granted, and to determine the terms and conditions of the

interim operation.

3. Both individual and joint operations were to be considered by the Review Board.

Thereafter, under decision FCC 65R-341, released Sept. 15, 1965, the Review Board denied all applications for interim operating authority. The basic reasons for the decision of the Review Board were given as being that:

1. "The grant of temporary authority to one of the several applicants before there had been any hearing is pregnant with danger to truly comparative consideration."
2. The Radio 1380 (RTEI) proposal would cause interference to several existing stations.
3. The proposal for interim operating authority of RTEI could result in prejudicing the outcome of the regular proceeding.
4. Grant of the RTEI proposal might abrogate the hearing rights of stations subject to interference.
5. There is no compelling or immediate need for an interim authorization in St. Louis.
6. Therefore, the detriments resulting from an interim authorization to RTEI outweigh the benefits, so that the proposal of RTEI would not serve the public interest.

Thereafter, by Memorandum Opinion and Order, FCC 65-1157, dated Dec. 22, 1965, the Commission overruled the Review Board and ordered that the application for review filed by RTEI be granted to the extent indicated and that all other applications for review were denied. The conditions were that within thirty days following the release of their order any other applicant in the interim hearing proceeding could become a party to RTEI on equal terms and conditions with all other parties to that interim grantee and, within thirty days following the release of the order RTEI may apply for modification of the authority if it should obtain an agreement for use of the existing facilities of KWK, and the terms of the agreement between parties to RTEI may not require that the winning applicant in this proceeding purchase the physical facilities of RTEI, when the interim operation is terminated.

Reasons given for the Commission's decision were that "the public interest would best be served by maintaining the status quo for the interim period necessary to complete the proceedings involving regular authority to operate on the frequency to be vacated by KWK or an adjacent frequency", that the investment contemplated by RTEI was not so large as to prejudice the hearing rights of any party not participating in the interim operation and that the RTEI proposal was "open ended" in that all other permanent applicants could become parties to it if they so desired. The Commission also stated that "maintenance

of the status quo in St. Louis during the regular proceeding will not prejudice the chances of applicants seeking use of KWK's frequency elsewhere. The question before us in the regular proceeding is the same--i.e., whether a broadcast frequency used for almost forty years by a station in St. Louis should now be used at some other location or at all. Our resolution of this question will not be affected by a continuation of KWK's long existing service for the comparatively brief additional period this hearing will take. Nor will our resolution of the question be affected by the total investment in an interim St. Louis operation by RTEI." (Emphasis supplied)

It was further ordered by the Commission that the interim authority authorized shall terminate upon grant of program test authority to the winning applicant in the regular hearing proceeding or upon denial of all application in that proceeding.

Commissioner Robert T. Bartley dissented from the Commission's ruling citing the abundance of broadcast services available in the area already, evidencing no immediate or imperative necessity to authorize interim operation, that the Commission's action in this case was contrary to their action in a previous case where they denied interim authority because it could not find "extraordinary circumstances requiring emergency operations in the public interest." In addition Commissioner Bartley's dissent refers to the fact that considering the long period of use by the frequency of 1380 KC and the changes that had

occurred throughout that period a new look should be had by means of an evidentiary hearing before any license be granted and that the investment by RTEI was highly prejudicial to other applicants for regular operation and that "the majority's grant here rests on the unsupported assertion that maintaining the status quo for the interim period would best serve the public interest. This falls far short, I believe, of the public interest findings necessary to justify the "extraordinary" procedure of an interim authorization."

Also included in Commissioner Bartley's dissent is the following: "It has been two and one-half years since the Commission revoked the KWK license (May 27, 1963) because of willful misconduct resulting in frauds upon the public. All legal appeals were exhausted with the U.S. Supreme Court denying certiorari on March 1, 1965. Yet, to this day, the Commission majority has permitted the licensee to continue operating this station. I think it is incumbent upon the Commission in the proper exercise of its statutory responsibilities to end this operation and to order it off the air immediately."

Commissioner Loevinger concurred in the dissent of Commissioner Bartley on the points expressed above.

Thereafter, by order FCC 66-374, released April 28, 1966, the Commission extended the special temporary authority of RTEI to and including June 30, 1966.

Thereafter, on Dec. 23, 1968 the eight remaining applicants for regular operation filed a "Joint Request for Approval of Agreement, Grant of Application of Victory Broadcasting Co., Inc., as Amended, and Dismissal of the other above captioned applications." Thereafter, on Feb. 3, 1969 the Broadcast Bureau of the Commission filed its opposition to the joint request filed by the eight remaining applicants. In its opposition, the Broadcast Bureau states that the amendment was filed with the Hearing Examiner on Jan. 15, 1969. The terms and conditions and other pertinent data relating to the settlement agreement are described in the Broadcast Bureau's opposition which was Docket No. 17210, File No. BP-16749.

The following constitute highlights of the settlement as described by the Broadcast Bureau.

Under the terms of the dismissal agreement, Victory Broadcasting Co. and Archway Broadcasting Corp. would consolidate--with the surviving application being Victory's. Seventy-five percent of the consolidated entity stock (Vic-Way) would be held by some or all of Victory's present stockholders. The remaining twenty-five percent of the stock would be held by some or all of Archway's present stockholders. Vic-Way would then reimburse 7 of the 8 applicants (including Archway but excluding Victory) for various monetary claims. The petition made no attempt to explain why one of the successful applicants, Archway, was entitled to claim reimbursement expenses while the other, Victory,

was not. "Archway's claim makes no sense in logic, law or fact."

The Broadcast Bureau opposed the request for the following reasons:

1. The petitioners had made the profferred agreement subject to certain contingencies which were in violation of Section 311 of the Communications Act as amended and Section 1.525 of the Rules. The dismissing applicants had specifically conditioned the dismissal of their applications upon reimbursement for funds advanced to finance the deficit interim operation.
2. The agreement and the so-called supporting papers did not fully explain and justify the consideration claimed as required by Section 1.525(A) (5) of the Rules.
3. For the reasons articulated, infra, it must be concluded that dismissal of two of the applications would impair Section 307(B) of the Act and that these two applicants should be required to publish.
4. In numerous instances, contrary to Section 1.525(a) of the Rules, petitioners had not shown or even attempted to show that the expenses incurred were "--in connection with preparing, filing, and advocating--their--applications" (the Board stated, "in fact, in certain instances claims are made for items that petitioners obviously must have known the Board had disallowed in the past. For example, it is settled

law that an agreement for reimbursement of expenses in connection with dismissal of an application may cover only expenses incurred on the particular proposal involved yet these petitioners had submitted numerous claims for expense directly relating to the interim operation of RTEI;--".

5. Claimants had not shown or even attempted to show that their expenses were "legitimate and prudent" outlays as required by Section 1.525(a) of the Rules.

The Broadcast Bureau stated the dismissing applicants had submitted monetary claims that fell into three categories:

1. The dismissing applicants wanted reimbursement for their original purchase price for RTEI stock.
2. Funds advanced to RTEI to finance the deficit operation.
3. Each individual applicant's total legitimate and prudent out-of-pocket expenses incurred in connection with the preparation and prosecution of its respective application. (The Broadcast Bureau stated "unlike the other two previous categories of expenses, any disallowance by the Commission in this category shall not be grounds for voidance of the agreement.")

The following are quotes from the Broadcast Bureau's opposition:

"Clearly, operating losses incurred in the interim operation are not expenses related to the prosecution of the regular permit application. However, the parties have specifically conditioned

their agreement to dismiss on reimbursement for their interim losses. As a result the Commission can not make the statutory finding required by Section 311(C) of the Act that approval of the agreement would serve the public interest." (emphasis supplied)

"Accordingly, the agreement can not be approved unless the parties forego these claims as a condition of settlement."

"As previously noted, since Archway is to be a twenty-five percent stockholder in the ultimate licensee (if the agreement were approved), we do not see how it can justify any reimbursement unless and until it first establishes that its twenty-five percent equity in the merged corporation is insufficient reimbursement for its prior expenses--. It has not done this. It has not even attempted to do this. Accordingly, it should receive no reimbursement whatsoever."

"Finally, we are not certain that 47 USC 307(B) publication is not required. Victory has submitted an amendment which is designed to implement the dismissal agreement. Although 'good cause' for the amendment has not been shown, and although such amendment should therefore be denied, we believe the requirements of 47 CFR 1.522(B) should be waived under the complex and unusual circumstances presented here. However, even so, we are not certain that the engineering amendment provides the best proposal that is available for the public."

"The best coverage benefits for the public obviously would come from a grant of either Great Rivers or Missouri's proposal.

The Review Board has correctly expressed its concern in this regard. Accordingly, we believe that publication should be ordered for Great River and Missouri. Otherwise 47 USC 307(B) would be unduly impeded."

The following is the Broadcast Bureau's summary of its opposition:

"The Bureau respectfully submits that this dismissal agreement must be denied because the provisions for reimbursement of interim operating losses is violative of Section 311(C) of the Communications Act as amended. As stated, supra, this reimbursement is specifically contingent upon the parties willingness to dismiss their applications. The Board, in the past, has made clear that it will not entertain dismissal agreement which are subject to a contingency. American Home Stations, Inc., 2 FCC 2nd 126. For this reason consideration as to whether the applicants have adequately established their expenses were prudently and legitimately expended in the prosecution of their applications is not necessary. However, should the Board reach this question, we have detailed in numerous instances where the parties have failed to furnish the necessary supporting information and where such expenses have been previously disallowed. Additionally, we have made clear that 307(B) consideration require publication with regard to the Great River and Missouri applications."

Thereafter on April 3, 1969 and April 15, 1969 the appellant,

Karin Broadcasting Co., hereinafter referred to as Karin filed letters with the Commission which were received by the Review Board.

The Review Board released an order, FCC 69R-174, certifying to the Commission for consideration the joint request for approval of agreement. In its order, the Review Board stated "it further appearing, that the initial letter from St. Louis counsel for Karin Broadcasting Co. raises questions concerning the activities and qualifications of Vic-Way Broadcasting Co., the successful applicant under the settlement agreement, and that its subsequent letter, directed to the Commission, contains allegations that there has been an unauthorized transfer of control of RTEI the interim operation, and requests that the Commission issue an order to show cause to determine why the temporary authority of RTEI should not be revoked;--It is ordered, that the request for certification, filed March 7, 1969 by Archway Broadcasting Corp. and Victory Broadcasting Co., Inc. is granted; and that the joint request for approval of agreement, grant of application of Victory Broadcasting Co., Inc. as amended and dismissal of the other above-captioned applications, filed Dec. 23, 1968, by Great River Broadcasting, Inc., et al; the petition for leave to amend, filed Jan. 15, 1969, by Victory Broadcasting Co., Inc.; and the letters from counsel for Karin Broadcasting Co. received by the Review Board on April 3 and April 15, 1969; together with all related pleadings and court

documents, are certified to the Commission for its consideration."

Thereafter, by Order FCC 69-674, the Commission (with Commissioner Bartley dissenting and Commissioners Cox and Johnson concurring in the result) released June 19, 1969, ordered "that the joint request for approval of agreement, grant of the application of Victory Broadcasting Co., Inc., as amended, and dismissal of the other above captioned applications filed Dec. 23, 1968, by the eight above-captioned applicants is granted, subject to the determination of the Review Board concerning the proposed reimbursement of specific out-of-pocket expenses, states that Vic-Way is a ninth applicant. It is further ordered, that the petition for leave to amend filed Jan. 15, 1969 by Victory Broadcasting Co., Inc., is granted. It is further ordered, that the informal requests of Karin Broadcasting Co. for relief are denied. It is further ordered, that this matter is referred to the Review Board for further action consistent with this order and the Review Board is directed to conclude this matter as expeditiously as possible." (emphasis supplied)

The findings of the Commission as stated in its order were essentially based upon the following:

1. A "current balance sheet."
2. That only one community was involved.
3. That the Review Board would make a determination as to whether out-of-pocket expenses had been properly

substantiated and were "legitimately and prudently expended."

4. That Karin's contention of unauthorized control was unfounded since RTEI's board of directors had not changed.
5. That Karin's arguments were without merit since they had not set forth sufficient allegations of fact to raise a substantial material question of fact.
6. "For the reasons set forth above, we are of the view that the joint agreement will serve the public interest, convenience and necessity and that the joint request should be approved subject to the determination by the Review Board that the individual out-of-pocket expenses have been properly substantiated."
7. "The Review Board is also authorized to grant Victory's application, dismiss the remaining competing applications, and take such further action as may be necessary to implement joint agreement. Thus our action herein will take effect as of the date that the Review Board's order becomes effective."

Thereafter on July 1, 1969 Karin, a corporation comprised of the majority of the employees of the interim permittee, filed a motion for stay, for reconsideration, for leave to intervene, and/or to offer new evidence.

Thereafter by Order, FCC 699-744, of the Commission, released July 3, 1969 the Commission denied relief to Karin. In that order the Commission stated, referring to its previous order of June 19,

1969, the following: "The order further contemplated the grant of the application of Victory Broadcasting Co., Inc., as amended to reflect a merger of Victory and Archway Broadcasting Corp. into a new corporation Vic-Way Broadcasting Co., and reimbursement of the dismissing applicants out-of-pocket expenses as determined by the Review Board."

Karin had alleged that the applicants had transferred control of the interim permittee, RTEI, to Vic-Way without the Commission's approval. That Vic-Way had given operating funds directly to RTEI, that Vic-Way had exercised management control over RTEI, and that the program format was changed through the efforts of Victory's representative without the Commission's approval. Also that the Commission had permitted a new entity to come into this proceeding many years after all other prospective applicants were legally excluded.

And further that since Karin had not been permitted to file an application for this facility, Karin claimed that the Commission's action approving the agreement was contrary to the public interest and the requirements of due progress.

Further, that the financial investment by the Ford Foundation would allow the Ford Foundation to control Vic-Way's programming in violation of the Commission's rules, that the financial aspects of the applicant's agreement had not been submitted to scrutiny and a hearing and that the Commission should not have accepted the appraised value for RTEI's leasehold

interest and that the merits of its points should be considered in a hearing.

The Commission stated in its order "--Karin has not supported its assertion with sufficient allegations of fact to raise a substantial and material question of fact. Although Karin claims that our action is contrary to the public interest, it has not referred to any specific section of the Communications Act or to any particular provisions of our rules. It has not set forth any activities or conduct by the applicants which would violate the Act or Regulations. Rather, Karin has relief on generalized conclusions and unsupported allegations of misconduct." Further in its order the Commission stated "Contrary to Karin's assertion, Vic-Way is not a new applicant. It is merely a modification of an existing applicant, after an amendment consistent with our regulations. We are not aware of any provision of the Act or of our rules that would require Vic-Way to be treated as a new applicant or that would require this proceeding to be open to new parties. We have often approved such a merger proposal in order to hasten the institution of a new service, and we believe that the public interest will be best served under the circumstances of this proceeding by placing the responsibility for operation of this facility on a regular licensee at the earliest possible time." (emphasis supplied)

Thereafter the Commission by its Order of Oct. 6, 1969, FCC 69-1056, (Commissioner Bartley dissenting and issuing a

statement, Commissioner Cox concurring in the result, and Commissioner Lee absent) denied Karin's petition for reconsideration and application for review filed Aug. 4, 1969. In its order the Commission acknowledges the following points raised by Karin:

1. That the financial showing concerning the value of RTEI's leasehold interest is deficient in that it had obtained a sworn and verified appraisal indicating that the RTEI leasehold interest is worth only \$129,000.00 as compared with the \$500,000.00 as asserted by RTEI. Thus a serious question was raised as to whether RTEI's net worth was sufficient to reimburse all the applicants contributions
2. Karin asserted that the value of RTEI's assets should be reduced in view of the fact that claims have been made to Tax Authorities in St. Louis that the entire interest in the land is worth substantially less than \$500,000.00, that the owner of one parcel of land claimed ownership of KWK's radio towers and ground system and that the lessors denied the assignability of RTEI's leases, and that Vic-Way was not a legally constituted Missouri corporation and that it was a new applicant which must comply with all the requirements for a licensee.

The Commission acknowledged that Karin urged that a third appraisal should be made by an independent party to determine whether RTEI's financial showing was deficient. The Commission

stated "Karin did not attempt at that time to seek to intervene in this proceeding, nor did it attempt to point out any deficiencies in the agreement. Since it has not shown good reason why it was not able to participate in the earlier stages of this proceeding and promptly present its contentions concerning the reimbursement agreement as required by Section 1.06(B) of our Rules and since it has never established that it should be made a party to this proceeding, we are convinced that Karin's present petition is procedurally defective and that it could be dismissed. Nonetheless, in light of the serious public interest questions raised by Karin we believe that these questions should be resolved on the merits.--For this reason we do not believe that any useful purpose would be served by further attempt to evaluate this real estate interest--since there is no evidence in the present record that RTEI's appraisal was not made in good faith, we are convinced that RTEI's financial showing is sufficient to reflect its net worth fairly and adequately." (emphasis supplied). The Commission also stated that while Victory did not sign this lease until July 1969 we do not believe that this fact would be an impediment to an assignment in view of the precise terms of the lease permitting assignment to the winning applicant, whether or not it had participated in the interim operation.

Commissioner Bartley in his dissenting statement dissented for the reasons following:

1. That Vic-Way had not established its financial ability to pay off the withdrawing applicants.
2. The data before us on reconsideration further raises in my opinion, substantial and material questions of fact as to that financial ability, which should be resolved pursuant to Section 309(E) of the Communications Act in an evidentiary hearing.
3. The appraisal submitted regarding the leasehold were too disparate for the Commission to find that either is conclusive on the record now before them.
4. There is an unresolved question of whether Vic-Way has reasonable assurance that its proposed site will be available.
5. An unsatisfactorily resolved question of whether there has been an unauthorized transfer of control of RTEI by the actions of Victory and Archway because, contrary to the statement of footnote 1, the Commission did not, I believe, consent to a transfer of control since it could not, pursuant to Section 310(B) of the Act, "except upon application to the Commission", and no such application has been filed for the Commission to act upon. "Thus while agreement may have been contemplated" a transfer of control (upon proper application and grant by the Commission), the Commission's "general affirmation" of the agreement really recognize that contemplation but could not include approval of a non-existent application for transfer, and to say now that it did is,

in my opinion, reversable error. By Memorandum Opinion and Order, FCC 69R-400, released Oct. 2, 1969, by the Review Board, it was ordered that the joint petition for partial reconsideration of July 10, 1969 Memorandum Opinion and Order filed on Aug. 8, 1969 by St. Louis Broadcasting Co., Home State Broadcasting Corp., and Six-Eighty-Eight Broadcasting Co. is granted. By Memorandum Opinion and Order released July 10, 1969, FCC 69R-293, the Review Board considered the reimbursement claims of the parties in light of the Broadcast's Bureau's objection to certain expense items. By its order, FCC 69M-1267, released Oct. 6, 1969, the Commission considered a request filed Aug. 12, 1969, by the Chief, Broadcast Bureau, for an extension of time within which to respond to a motion for temporary stay in a petition for reconsideration and application for review, both filed Aug. 4, 1969, by Karin Broadcasting Co. The Commission stated that it appeared that the Bureau's request is now moot in view of the Commission's action herein, FCC 69-911 released Aug. 29, 1969 and FCC 69-1056, adopted Oct. 1, 1969, denying Karin's request. Accordingly it was ordered pursuant to Section 0.371(B) of the Commission's statement of delegation of authority, that the request for extension of time filed by the Chief, Broadcast Bureau on Aug. 12, 1969, is dismissed as moot.

Thereafter on Nov. 3, 1969 Karin Broadcasting Co. filed a request for relief asserting that it had filed notice of appeal

of this proceeding in the United States Court of Appeal for the District of Columbia, but that it wished to be certain that it had exhausted all of the administrative remedies before it requested temporary relief from the Court. Karin urged the Commission that it should treat its letter as a motion for stay, a motion for reconsideration, and/or any other relief which may be deemed appropriate. The Commission denied relief. Commissioner Bartley dissenting, stated that Karin had raised new factual allegations namely, 1, there are now three corporations Vic-Way, Victory and Archway, involved in the ownership, management and control of Radio 1380, Inc. instead of one, Vic-Way, as intended; 2, Archway, a paid off and dismissed applicant, which at least was to own 25% of Vic-Way, now finds itself as a 50% owner of the interim permittee, Radio 1380, Inc., which will probably be compelled to remain in business for at least two more years unless its authority is revoked; and that the programming format approved in December, 1965 in Radio 1380's application has been totally and drastically revised by Victory and Archway since August, 1969, without any effort to amend the Radio 1380 application or to obtain the requisite FCC approval.

ARGUMENT

POINT I - THE COMMISSION SHOULD NOT HAVE GRANTED INTERIM AUTHORITY BECAUSE THE REQUIRED CONDITIONS DID NOT EXIST AND BECAUSE IT WAS FOR AN INDEFINITE PERIOD.

Except for the emergency provisions contained in Sec. 308 of the Communications Act of 1934 and the temporary authorization provided for in Sec. 309(f) of said statute (limited to six months) Congress has not authorized the Commission to grant any operating authority save "regular" grant. It has never been contended that the grant to RTEI falls within either of the foregoing exceptions therefore authority of the Commission, if any, must be derived from elsewhere in the statute.

The case of Community Broadcasting Co. v Federal Communications Commission, 107 U.S.App.D.C.95, 274F 2d 753 (1960) is cited as authority for the granting by the Commission of interim authority. However, in the Community case the Court stated it was merely upholding a policy action adopted by the Commission. No statutory authority has been offered in support of the Commission's action.

It is contended that to hold that the Commission has a general power to grant interim (non-regular) permits is to in essence make the foregoing exceptions nullities.

It is submitted that with respect to all grants (except the foregoing exceptions) the Commission shall determine whether

the public interest, convenience and necessity will be served by such grant. It is also contended that there is no second class finding, or temporary finding of public interest, convenience and necessity authorized by Congress. It is conceded that the Commission may make a "regular" grant which is subject to limitations, as was the case in *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945).

In the instant case the findings of the Review Board indicate that at the time of the application for interim authority the City of St. Louis was assigned seven standard broadcast station, six FM broadcast stations and six TV broadcast stations. That the RTEI proposal for St. Louis would cause interference to several existing stations. That the applicants for temporary authority, with the exception of two, were also applicants for permanent authority. The Review Board explicitly found that considering all of the circumstances existing that it would be detrimental to the public interest to authorize the interim operation.

The Commission in reversing the Review Board stated that the grant was in the public interest, however, in its own decision the Commission admits that it had not determined whether the broadcast frequency in question should be used and if so whether it should be in the same location. It is contended that these findings are irreconcilable. In his dissent from the Commission's decision, Commissioner Bartley, cited the

abundance of broadcast services available in the area already, evidencing no immediate or imperative necessity to authorize interim operation and that the Commission's action in this case was contrary to their action in a previous case where they denied interim authority because they could not find "extra-ordinary circumstances requiring emergency operations in the public interest."

It is appellant's contention that the Commission totally failed to fulfill its responsibility to make a determination in the public interest since in the words of Commissioner Bartley "the majority's grant here rests on the unsupported assertion that maintaining the status quo for the interim period would best serve the public interest."

The Court stated in the Community case, "the grant of temporary authority to one of several applicants before there has been any hearing is pregnant with danger to truly comparative consideration." The Commission sought to avoid this danger by authorizing an "open-ended" "joint" interim operation. Any applicant for permanent authority could become a part owner of the interim operator. However, by granting such an open-ended authority the Commission avoids its basic duty of determining whether it is in the public interest, convenience and necessity. Under this arrangement "all" applicants seemingly are presumed qualified individually and jointly. In the instant case to presume that all of several applicants would individually

be qualified without investigation by the Commission is extremely far-fetched and further to presume that a combination of several applicants, all of whom by the very nature of the proceeding have interests adverse to each other, does not appear to make any sense whatsoever.

It is further contended, under the authority previously cited, that the indefinite term of the interim grant makes it void on its face. Congress has expressly provided that no grant shall be for a longer term than 3 years, (Sec. 307). No Court decision has allowed the Commission to make grants beyond this period. As the grant stands, it might never end by its terms. The substance of this argument, as well as the previous argument relative to the power of the Commission to make such a grant, is borne out by the facts as they have occurred because the interim authority has continued for a period going on 5 years at this point in time.

It is further contended that the points raised herein were not previously decided by this Court in *Beloit Broadcasters, Inc., v. F.C.C.*, 125 U.S.App.D.C. 29, 365F 2d 962 (1966). In that case, to which appellant was not a party, the sole relevant question was whether the Commission's action came within the Community case criteria.

The Commission in making its grant of interim authority played down many of the points raised by the Review Board by alluding to "the comparatively brief additional period this

hearing will take." This was in 1965. Somewhere and somehow this unauthorized exercise of power by the Commission must be stopped. The grant by the Commission and its current tolerance of the interim operation is clearly contrary to the Congressional policy and intent described by this Court in 1967 in *Folkways Broadcasting Co. v. F.C.C.*, 379 F. 2d 447.

POINT II - THE COMMISSION SHOULD NOT HAVE GRANTED THE CONSTRUCTION
PERMIT SINCE IT BASED ITS GRANT UPON APPROVAL OF A
SETTLEMENT AGREEMENT FOUNDED UPON AN APPLICATION WHICH
HAD BEEN SUBSTANTIALLY AMENDED AND THE REQUIRED PUBLIC
NOTICE OF SUCH AMENDMENT HAD NOT BEEN GIVEN.

Sec. 309(b) of the Communications Act of 1934, as amended, provides:

"(b) except as provided in subsections (c) of this section no such application -
(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or*****shall be granted by the Commission earlier than 30 days following issuance of public notice by the Commission of the acceptance for filing of such application or any substantial amendment thereof." (emphasis supplied)

Subsection (c) of Sec. 309 provides that in essence a subsection (b) would not apply to a minor amendment and other

situations not pertinent here.

In the instant case the amendment to the Victory application, which formed the basis for the settlement agreement, provided that Vic-Way would replace Victory as the applicant. It was also provided that Victory would own 75% of Vic-Way and Archway, a competing applicant would own 25% of Vic-Way. It is contended by appellant that there is no question whatsoever that the above referred to Sec. 309(b) applies to this amendment and publication by the Commission was absolutely required to give the public notice. There can not be much doubt as to why such a provision was added by Congress to the Communications Act.

The status of the appellant through the proceedings before the Commission has constantly been challenged. The Commission, in its order released Oct. 6, 1969 comments that Karin had not shown good reason why it was not able to participate in the earlier stages of this proceeding and promptly presents its contentions concerning the reimbursement agreement.

It is contended by the appellant that the failure of the Commission to give public notice has detrimentally affected the appellant in the Commission proceedings and it is impossible to determine what other members of the public might have done had they received the required notice, therefore, it is respectfully urged to this Court that all actions taken subsequent to the filing of the aforementioned amendment, by the Commission, were either totally void or voidable.

POINT III - THE SETTLEMENT AGREEMENT WITHOUT FIRST DETERMINING
THAT PROPOSED REIMBURSEMENTS TO DISMISSING APPLICANTS
WERE PROPER AND LEGAL.

Sec. 311(c) of the Communications Act of 1934, as amended, provides in subsection 3 thereof the following:

"(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience and necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the grant of his application." (emphasis supplied).

The relevant part of the Commission's order of June, 1969 is as follows:

"Accordingly, it is ordered that the joint request for approval of agreement,*****is granted subject

to the determination of the Review Board concerning the proposed reimbursement of specific out-of-pocket expenses." (emphasis supplied).

This matter is discussed at great length and in great detail in the opposition of the Broadcast Bureau to approval of the agreement. In some manner, yet unexplained, Archway was to be paid off as a dismissing applicant and also to merge with Victory to become Vic-Way. It is clear that Archway has never lost its identity through merger and has received the same payments received by the other six dismissing applicants plus a portion of the ownership of Vic-Way. The value of its part ownership of Vic-Way has never been determined. Thus a dismissing applicant has not only been paid off but remains a substantial owner of the successful applicant.

It is contended by the appellant that the aforementioned order by the Commission is void on its face in that Sec. 311(c) clearly requires the Commission (not the Review Board) to first determine the amount or value of payment and that the amount or value is not in excess of the amount legitimately and prudently expended in connection with preparing, filing and advocating the grant of his application (not out-of-pocket expenses). Until this has been completed the Commission, by Congressional edict, cannot make the required public interest finding.

Further it is contended that the order is defective in that it allows the Review Board to determine that withdrawing applicants

may be reimbursed for "out-of-pocket expenses" as clearly indicated by the statutory provisions set out above, "out-of-pocket expenses" are not reimbursable. It is further contended that the statute provides that the "Commission" shall make the determination and not some subordinate body within the Commission. As indicated by the decision relative to the interim operation a decision or determination by the Review Board would not be binding upon the Commission and thus no determination, binding upon the Commission, has ever been made.

As the Broadcast Bureau pointed out "the petition makes no attempt to explain why one of the successful applicants, Archway, is entitled to claim reimbursement expenses while the other Victory, is not." Since Victory and Archway still maintain their separate identity from the "merged" corporation, differing only in the percentage of Vic-Way that each owns, the arrangement is still unfathomable.

It is contended by the appellant that the Commission has again failed in its responsibility to determine the public interest, convenience and necessity.

POINT IV - THE COMMISSION SHOULD NOT HAVE APPROVED THE SETTLEMENT AGREEMENT BECAUSE THE ABILITY OF THE REMAINING APPLICANTS TO PAY OFF WITHDRAWING APPLICANTS, THE AVAILABILITY OF THE PROPOSED SITE, A SHOWING OF PUBLIC INTEREST, CONVENIENCE AND NECESSITY AND A BONA FIDE MERGER OF COMPETING INTEREST HAD NOT BEEN ESTABLISHED.

As stated by the Broadcast Bureau, "clearly, operating losses incurred in the interim operation are not expenses related to the prosecution of the regular permit application. However, the parties have specifically conditioned their agreement to dismiss on reimbursement for their interim losses."

The withdrawing applicants were thus attempting to be reimbursed for funds advanced to RTEI to finance the deficit operation.

To avoid the label of "deficit" operations, the applicants submitted a "current balance sheet".

Thus in February of 1969 the Broadcast Bureau of the Commission classifies RTEI's operation as a deficit operation, the Commission in June of 1969 states that RTEI is a very healthy company.

In its October 6, 1969 order, the Commission expressly states that the request for reimbursements were approved primarily because of this healthy condition which was to a major extent based upon an evaluation of a leadhold interest of RTEI. Thereafter, the appellant submitted to the Commission a verified appraisal indicating that the leasehold should have been appraised at approximately 1/4th of that previously submitted to the Commission and this value would then result in the Commission reversing its position with regard to the reimbursements. The appellant requested the Commission to have an independent appraisal made

of the property. However, when faced with this one particular facet which could cause the entire proceedings to go in one direction or the other the Commission instead of taking independent action resorted again to the words of the applicants and were assured that all was well and the Commission accepted it.

Throughout the proceedings before the Commission the appellant has raised the question of the availability of the proposed site to no avail. Commissioner Bartley in his dissent raises this question of the availability of the proposed site. It is submitted that the Commission cannot grant a construction permit when it has not been assured that the proposed site would be available, because then its decision, which is supposedly based upon the public interest, convenience and necessity, would merely be a matter of conjecture. Also if a substantial change in site becomes necessary, the whole process must be reopened for the reasons stated under Point II. Further, until and if the proposed site is available the interim operation continues to march on. In earlier pleading, opposing counsel has referred to legislative history. It should be pointed out that in the legislative history referred to by counsel for the Commission that Congress expressed concern about a determination by the Commission that so-called "mergers" be scrutinized by the Commission to assure that a "merger" was bona fide, the concern expressed being based upon past abuses. Acceptable "mergers" are to be "bona fide mergers of competing interests." Merger implies the vanishing

of the original parties and the emergency of a new entity, however, in the present case as clearly shown by the pleadings the three entities have maintained their original identities. It would seem clear that this arrangement is nothing more than an obvious pay off to Archway, a "dismissing" applicant, of a substantial interest in Vic-Way, the value of which the Commission has not determined, and which is clearly contrary to the provision of Sec. 311 of the Communications Act of 1934, as amended.'

It is further contended that the Commission erred in that it did not require publication pursuant to Sec. 307(b) of the Communications Act and Sec. 1.525(b) of the Rules. This point is covered at length in the Broadcast Bureau's opposition.

POINT V - THE COMMISSION, HAVING RECEIVED CHARGES OF REPEATED
WILLFUL VIOLATION OF WELL ESTABLISHED COMMISSION
RULES, SHOULD HAVE HELD APPROPRIATE HEARINGS.

Sec. 309(e) of the Communications Act of 1934, as amended, reads as follows:

"(e) If, in the case of any implication to which subsection (a) of this section applies, a substantial material question of fact is presented*****,
it shall formally designate the application for hearing on the ground for reasons then obtaining
and shall forthwith notify the applicant and all

other known parties and interest of such action and the grounds and reasons therefor,*****. When the Commission has so designated an application for hearing, the parties in interest, if any,*****may acquire the status of a party to the proceeding thereon by filing a petition for intervention*****any hearing subsequently held upon such application shall be a full hearing in which the applicant and all parties and interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant,*****."

In the instant case, as confirmed by Commissioner Bartley in his dissent to the October 1969 and December 1969 decision of the Commission, Karin had presented to the Commission numerous substantial and material questions of fact. The Commission had failed to follow the procedure directed by statute, even though such action was called to their attention by Karin and by Commissioner Bartley.

The charges presented to the Commission by Karin are illustrated by the following:

1. That Vic-Way did not have the financial ability, as required, to pay off the withdrawing applicants;
2. That the proposed site was unavailable;
3. Unauthorized control;
4. Unauthorized transfer of control;

5. Drastic changes in programming format of the interim permittee without prior or subsequent approval by the Commission;
6. Loans to the construction grant permitte which contained illegal conditions;
7. Unauthorized interruptions of service;
8. Unfair labor practices.

The above list describes in general terms the nature of the charges asserted by Karin. The Commission's response to these charges has been that they were not sufficiently factual.

It is contended by the appellant that factual allegations were made by Karin and of the 8 described above 2 will be discussed for illustrative purposes.

Karin has advised the Commission of the case number and parties of a labor arbitration resulting from employee discharges.

Karin has also advised the Commission of the cause number in a civil action presently pending in the U.S. District Court for the Eastern District of Missouri, wherein it is maintained that the litigation resulted when the interim permittee refused to arbitrate the discharge of the engineer employees of RTEI. It would seem that advising the Commission of cause numbers and parties should be sufficient factual allegations to alert the Commission.

In regard to the financial ability to pay off withdrawing applicants, the following occurred.

The Commission asserted in its own opinions that the financial ability of Vic-Way to pay off the withdrawing applicants was crucial and critical to its determination and approval of the settlement agreement. The Broadcast Bureau in its opposition, described the interim operation as a deficit operation. Subsequently the Commission determined that it was a healthy operation to the extent that its assets exceed its liabilities by \$172,000.00. The major item listed in the assets was a leasehold which was appraised by the applicants at \$500,000.00. Karin submitted to the Commission a verified appraisal valuing the leasehold at \$129,000.00. It would appear that if the applicant was correct, on paper, the financial ability had been established. However, if the appraisal submitted by Karin was correct then the liabilities would exceed the assets by approximately \$199,000.00, and thus clearly establish that the financial ability did not exist and by the words of the Commission, they would have not approved the settlement agreement.

It is contended by the appellant, confirmed by Commissioner Bartley in his dissent, that the Commission has completely ignored the Congressional edict contained in Section 309(e) of the Communications Act. It would seem that this was just one of the many instances where the Commission has attempted to avoid the publication, notice and hearing requirements directed by Congress.

The words of this Court in the recent case of Office of

Communication of the United Church of Christ, etc. v. F.C.C.
Cause No. 19,409, decided June 20, 1969 although not directly
in point or certainly pertinent,

"the public interveners who were performing a public
service under a mandate of this Court, were entitled
to a more hospitable reception in the performance of
that function. As we view the record the examiner tended
to impede the exploration of the very issues which we
would reasonably expect the Commission itself would
have initiated; an ally was regarded as an opponent."

(emphasis supplied).

In the instant case the Commission had stated that if
Vic-Way could not establish its financial ability it would not
approve the settlement agreement, Karin submitted proof to the
Commission that such financial condition did not exist. The
following two quotes from the Commission's opinion and order
of October 6, 1969, illustrate the foregoing:

"On the basis of a verified appraisal of RTEI,
leasehold real estate interests, indicating a
value in excess of \$500,000.00, we allowed the
proposed reimbursement and referred other requests
for reimbursement of out-of-pocket expenses to the
Review Board.", and

"For this reason we do not believe that any useful
purpose would be served by further attempt to

evaluate this real estate interest. Since there is no evidence in the present record that RTEI's appraisal was not made in good faith, we are convinced that RTEI's financial showing is sufficient to reflect its net worth fairly and adequately."

It seems fair to assert that the Commission's obligation was to determine the value of the real estate interest and not to determine whether an appraisal had been made in good faith.

POINT VI - THE COMMISSION SHOULD HAVE REVOKED THE INTERIM AUTHORITY BECAUSE OF AN UNAUTHORIZED TRANSFER OF CONTROL.

Sec. 310(b) of the Communications Act of 1934 provides as follows:

"(b) No construction permit or station license or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application

shall be disposed of as if the proposed transfer or assignee were making application under Sec. 308 for the permit or license in question;*****."

This statutory provision seems relatively clear. However, as confirmed by Commissioner Bartley in his dissent to the October 6, 1969 order, the Commission has completely ignored this provision.

The words of Commissioner Bartley are especially pertinent to this situation and are as follows:

"*****and an unsatisfactorily resolved question of whether there has been an unauthorized transfer of control of RTEI by the action of Victory and Archway because, contrary to the statement in footnote 1, the Commission did not, I believe, consent to a transfer of control since it could not, pursuant to Sec. 310(b) of the Act 'except upon application to the Commission' and no such application has been filed for the Commission to act upon. Thus, while the agreement may have 'contemplated' a transfer of control (upon proper application and grant by the Commission), the Commission's 'general affirmation' of the agreement merely recognized that contemplation but could not include approval of a non-existent application for transfer, and to say now that it did is, in my opinion, reversible error." (emphasis supplied).

The Commission in footnote 1 of its opinion and order

acknowledges that a transfer of control of the interim to Victory and Archway (a transfer not to the successful applicant, but to two dismissed applicants) took place on July 25, 1969. It seems clear that the Commission has unquestionably violated the provisions of the Communications Act as set out above.

CONCLUSION

THIS COURT should remand the proceedings to the Commission with directions to revoke the interim authority forthwith and to revoke the construction permit.

Dated, June 13, 1970.

Respectfully submitted,

JEROME J. DUFF,
ROGER M. HIBBITS,
Attorneys for Appellants



BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,608

KARIN BROADCASTING COMPANY,
A Corporation,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

VICTORY BROADCASTING COMPANY,
ARCHWAY BROADCASTING CORPORATION,
VIC-WAY BROADCASTING COMPANY,
Intervenors.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

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FILED NOV 16 1970

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,608

KARIN BROADCASTING COMPANY,
A Corporation,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

VICTORY BROADCASTING COMPANY,
ARCHWAY BROADCASTING CORPORATION,
VIC-WAY BROADCASTING COMPANY,
Intervenors.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

STATEMENT OF QUESTIONS PRESENTED *

1. Did the Commission violate the Communications Act when in 1965 it issued a joint interim authority to operate on the revoked frequency of radio Station KWK, St. Louis, Missouri pending selection a regular applicant to operate the station?

2. Did the Commission act contrary to the requirements of 47 U.S.C. 309(b) and 311(c) when it approved the proposed merger agreement between two of the regular applicants for the KWK frequency?

3. Did the Commission abuse its discretion, or act in an unreasonable manner, when it concluded that the allegations belatedly made in Karin's informal pleadings did not require an evidentiary hearing or revocation of the interim operation?

*/ Issue 1, the first point in appellant's brief, was previously before this Court in Beloit Broadcasters, Inc. v. F.C.C., 125 U.S. App. D.C. 29, 365 F.2d 962 (1966).

COUNTERSTATEMENT OF THE CASE

This purports to be an appeal from three recent actions of the Federal Communications Commission: (1) an Order released June 19, 1969, FCC 69-674 (A. 20-24); (2) a Memorandum Opinion and Order released October 6, 1969, FCC 69-1056 (A. 39-44); and (3) an Order released December 8, 1969, FCC 69-1327 (A. 44-48) (App. Br. 1). In fact, appellant challenges an earlier Commission Memorandum Opinion and Order, FCC 65-1156, released December 27, 1965, 2 F.C.C. 2d 207 (A. 10-16) which permitted the establishment of a joint interim operation pending selection of a regular licensee to operate on a radio frequency in St. Louis, Missouri, formerly owned by Station KWK, whose license was revoked in 1965 (Br. 1-5, 21-25). That action was reviewed and affirmed by this Court in Beloit Broadcasters v. F.C.C., 125 U.S. App. D.C. 29, 365 F.2d 962 (1966). Appellant also challenges the three Commission actions previously mentioned (A. 20-24, A. 39-44, and A. 44-48) approving a settlement agreement reached by the eight regular applicants for the KWK radio frequency resulting in the merger of two of the applicants and dismissal of the remaining applicants (Br. 6-20, 25-39).

Background: The Interim Operation And Settlement Agreement.

Appellant, Karin Broadcasting Company is composed of employees of Radio Thirteen-Eighty, Inc., the interim operator

of Station KWK, St. Louis, Missouri, and other individuals. Karin has never sought to intervene as required by Section 309(e) of the Communications Act, 47 U.S.C. 309(e), in the proceedings from which it now appeals. It did file informal objections which were considered by the Commission to the extent that public interest questions were raised. ^{1/} Very late in the proceeding Karin also expressed an interest in filing an application for the KWK frequency. It has never tendered an application.

In 1965 the revocation of KWK's license to operate a radio station in St. Louis, Missouri became final. Thereafter, in response to the Commission's public notice, eleven applicants sought the frequency previously utilized by KWK. This Court upheld the Commission's authorization of a joint interim operation by Radio Thirteen-Eighty, Inc., (RTEI), pending final action in the hearing to ascertain which applicant should be authorized to operate on KWK's frequency. Beloit Broadcasters, Inc. v. F.C.C., 125 U.S. App. D.C. 29, 365 F.2d 962 (1966). Eight applicants ultimately joined in the RTEI interim operation.

The mutually exclusive applications for the KWK frequency were designated for hearing on February 21, 1967

^{1/} Cf. Spanish International Broadcasting Company v. F.C.C., 128 U.S. App. D.C. 93, 101-102, 385 F.2d 615, 623-624 (1967).

(FCC 67-225). After extensive prehearing proceedings, some six days of hearings, and many months of negotiations, the applicants agreed to a settlement of the case. On December 23, 1968, they filed a joint request for approval of the proposed agreement as contemplated by 47 U.S.C. 311(c) and 47 CFR 1.525(a).^{2/} They sought a grant of the application of Victory Broadcasting Company as amended to reflect a merger of two original applicants, Victory and Archway, into a new corporation--Vic-Way Broadcasting Company. Victory would own 75% of Vic-Way's stock and Archway 25%. The remaining applicants proposed to dismiss their applications and Vic-Way would reimburse them for their out-of-pocket expenses including their contributions to the RTEI interim operation. Vic-Way would also assume the legal obligations of RTEI (A. 20-22).

The joint request contained (1) a copy of the proposed agreement, (2) a history of the negotiations between

^{2/} Section 311(c) of the Communications Act, 47 U.S.C. 311(c), authorizes the Commission to approve agreement which would resolve conflicts between competing applications. The legislative history of Section 311(c) reveals that both Congress and the Commission envisioned approval of bona fide mergers and reimbursement for legitimate and prudent out-of-pocket expenses of dismissing applicants. H. R. Rep. 1800, 86th Cong., 2d Sess. pp. 15-16, 1960 U.S. Code Cong. and Adm. News, pp. 3522-3524. Section 1.525 of the Commission's rules, 47 CFR 1.525, specifies the type of information which must be filed by applicants seeking approval of dismissal agreements. Pertinent provisions of Section 311(c) of the Act and Section 1.525 of the rules are attached as Appendix A.

the applicants, and (3) itemized statements of the expenses incurred by the dismissing applicants in connection with the prosecution of their applications. All the applicants urged that the public would benefit from the immediate settlement of the litigation. Victory urged that by retaining a 75% controlling interest, the merger would permit it immediately to establish the first Negro-oriented station in the community.

It also stated that:

Through its surveys of the St. Louis community, Victory Broadcasting Company, Inc., long ago established to its satisfaction that there is a definite need for a first Black-owned radio station in St. Louis, to furnish a means of social communication with the 40% or more of the city's population who are Blacks. Conscious of that need, Victory has steadfastly adhered to the single purpose of obtaining a controlling interest in such a station. Thus, when previous offers were made by other applicants for the settlement of the proceeding on a basis which would not have afforded Victory the opportunity to own and operate such a station, Victory, on repeated occasions, "held out" and refused to be a party to any such proposal.

When Archway Broadcasting Company offered to join with Victory in establishing a station, Victory was pleased with Archway's proposal. It offered Victory the opportunity to have a controlling interest in the kind of radio station it wanted to establish. Furthermore, the long residence of Archway's principals in the city of St. Louis and their prominence in the city's "establishment" made an association with Archway very attractive to Victory. Finally, Victory was not unaware that Archway's principals had important connections in the banking community, which could be most useful in obtaining the financing needed to effectuate a settlement. (Additional Reply of Victory filed February 26, 1969, pp. 4-5)

Objections to some aspects of the merger agreement were filed by the Broadcast Bureau which suggested that the applicants sought to be reimbursed for funds invested in the RTEI interim operation which were not reasonably and prudently expended in connection with their regular applications; had failed to substantiate some claims for reimbursement with sufficient affidavits; and that 47 CFR 1.525(b) required publication of certain terms of the agreement. In a series of letters beginning March 27, 1969, counsel for appellant Karin Broadcasting Company filed objections to the merger. Karin also sought revocation of the interim operation and later indicated some interest in filing an application for the ^{3/} facilities. No application was ever tendered.

1. The June 19 Order (A. 20-24)

In an Order released June 19, 1969, FCC 69-674, 18 F.C.C. 2d, 212, the Commission found no legal impediment to the proposed merger and concluded that it would be in the public interest. The merger was approved "subject to the determination by the

3/ While Karin urged that it should be permitted to file an application for the KWK facilities some five years after the time for filing mutually exclusive applications had passed, the Commission pointed out that there had been "ample opportunity for all interested parties to file such applications before this proceeding commenced. If the new parties were permitted to file applications at the conclusion of a proceeding, the administrative process might never be completed." FCC 69-744, released July 3, 1969 (A. 25-27, para. 5).

Review Board that the individual out-of-pocket expense items have been properly substantiated" as required by Section 311(c) of the Communications Act.

The Commission did agree with the Bureau that the applicants could be reimbursed for their contributions to the interim operation only to the extent that those amounts did not exceed their equities in that operation. However, a recently submitted balance sheet and a verified appraisal of real estate interests established that the payments to the dismissing applicants "fairly reflect the equities which would accrue to the parties upon dissolution" of the interim operation. (A. 21-22).

Publication pursuant to Section 1.525(b) was not required, the Commission concluded, because such publication is ordinarily limited to cases involving applications for different communities with the withdrawal of one of the applicants depriving its designated community of an opportunity to be assigned a radio station.^{4/} Here the applicants had all specified St. Louis, Missouri, as the station location, and the Commission was therefore "convinced that publication is neither necessary nor appropriate." (A. 22).

After reviewing Karin's informal complaints the Commission found that there was no merit to the unauthorized

^{4/} 47 U.S.C. 307(b) mandates the Commission to achieve insofar as possible "a fair, efficient and equitable distribution of radio service" among the various states and communities.

transfer of control charge, and that the other arguments were totally without merit. (A. 23-24).

Since its creation in 1962 the Commission's

Review Board has been delegated authority to rule on the reasonableness and prudence of expenses for which Section 311(c) permits reimbursement. Accordingly, the Commission provided in its order that in accordance with its usual practice, "allegations concerning specific out-of-pocket expenses should be remanded to the Board for its immediate consideration and for a determination of whether or not each of the remaining reimbursement items were legitimately and prudently expended in connection with the preparing, filing, and advocating of the dismissing applications." (A. 23, para. 7). It also ordered that the action approving the joint agreement would not take effect until the Board had issued a final ruling on the disputed expenses. (A. 24, n. 5).

5/ Karin had alleged that "since two of the three-member executive committee which supervises the day-to-day operation of the station have been replaced, an unauthorized transfer of control of RTEI has occurred. However, the executive committee serves at the pleasure of RTEI's broad of directors. The board is composed of one representative from each of the current applicants for regular operation. In view of the facts that the new members of the executive committee were elected by RTEI's board of directors, that they previously participated as members of the board of directors, and that the chairman of the executive committee remains unchanged, [the Commission was] convinced that no unauthorized transfer of control has occurred." (A. 23).
6/ Report and Order, 27 Fed. Reg. 5671, 5672 (1962); 47 CFR 0.161, 0.365.

By Memorandum Opinion and Order released July 10, 1969, 18 F.C.C. 2d 592, (A. 27-35) the Board detailed the expenses found to be legitimate, prudent and justified pursuant to Section 311(c), for which the dismissing applicants could be reimbursed. It dismissed the applications and granted the amended application of Vic-way Broadcasting Company.

2. The October 6 Memorandum Opinion And Order (A. 39-44)

Karin's request for reconsideration of the June 19 Order, and its application to review the Board's action, were denied in a Commission Memorandum Opinion and Order released October 6, 1969, 19 F.C.C. 2d 934. Initially, the Commission observed that Karin sought reconsideration of its June 19 Order, but that it had never sought to intervene in the proceeding nor had it attempted in a timely fashion to point out any deficiencies in the agreement. Thus, the Commission observed, "we are convinced that Karin's present petition is procedurally defective and that it could be dismissed. . . . ^{7/} Nonetheless, in light of the serious public interest questions raised by Karin, we believe that these questions should be resolved on the merits." (A. 42).

^{7/}See Spanish International Broadcasting Co. v. F.C.C., 128 U.S. App. D.C. 93, 385 F.2d 615 (1967); and Springfield Television Broadcasting Corp. v. F.C.C., 117 U.S. App. D.C. 214, 328 F.2d 186 (1964).

Turning to the merits the Commission found no substance to the charge that there had been an unauthorized transfer of control. It observed that the joint agreement contemplated that the interim operation (RTEI) "would be transferred to Victory and Archway, and our general affirmation of that agreement included, inter alia, approval of the transfer of the stock interests. Thus we consented to the transfer of control of RTEI to Victory and Archway which took place on July 25, 1969." (A. 39-40, n. 1). Karin had also questioned the financial ability of Vic-Way to pay off the dismissing applicants, disputing the value of RTEI leasehold interests, their assignability, and submitting an appraisal of its own. After reviewing the differences between the two appraisals and the specific provisions of the leases (A. 41-42), the Commission concluded that:

In view of the fact that each appraisal is inherently a matter of judgment and expertise, it is not surprising that two separate efforts would arrive at different conclusions. For this reason, we do not believe that any useful purpose would be served by a further attempt to evaluate this real estate interest. Since there is no evidence in the present record that RTEI's appraisal was not made in good faith, we are convinced that RTEI's financial showing is sufficient to reflect its net worth fairly and adequately. (A. 42).

It also found, contrary to Karin's claim, that RTEI could assign or sublet its leasehold interests. "Under these circumstances, we are convinced that these leasehold interests were properly included in our assessment of RTEI's net worth." (A. 42-43).

3. The December 8 Order (A. 44-48)

By Order released December 8, 1969, FCC 69-1327, the Commission denied Karin's request for a stay, reconsideration, and/or other relief. In large part, the Commission found that Karin had reargued questions previously argued and rejected. However, it "reconsidered the allegations and again conclude[d] that the action we have taken serves the public interest and is otherwise proper." Noting that Karin complained about the Commission's failure to comment upon certain aspects of the Vic-Way programming operation, the Commission indicated that the Vic-Way proposals were considered at the time the merger agreement was approved. Finally, the Commission observed that it has often approved merger agreements, "where, as here, they result in the selection of a qualified applicant whose proposals serve the public interest, thus terminating litigation and hastening the institution of service on a regularized basis." (A. 46, para. 4).

* * *

Thereafter, Karin filed with this Court a motion for stay seeking summary reversal, which was denied by Order filed December 22, 1969. A second motion for stay and for further hearing before the Commission was denied by this Court's Order ^{8/} filed May 25, 1970.

^{8/} Appellant did not file its brief within the time provided by the rules; after this Court's show cause order the brief was finally filed on July 29, 1970.

ARGUMENT

Both Congress and the Commission have recognized that merger agreements between competing applicants, and reimbursement of legitimate and prudent expenses of dismissing applicants, can serve the public interest by terminating needless litigation, and hastening the institution of broadcast service on a regularized basis. See note 2, supra. The eight regular applicants for the KWK frequency, after several weeks of prehearing and hearing sessions, and after months of negotiations, proposed a joint settlement agreement. They then filed with the Commission the information required by the Communications Act, 47 U.S.C. 311(c), and by the Commission's rules, 47 CFR 1.525(a).

Appellant Karin filed informal objections which were considered by the Commission before it concluded that the joint agreement would serve the public interest, and its Review Board, which customarily scrutinizes such questions, made specific findings about the expenses which were legitimate and prudent and substantiated. These specific findings have not be challenged before this Court.

Karin now argues that (1) the Commission did not have the power to authorize the interim operation in St. Louis, Missouri; (2) in approving the merger agreement the Commission violated the provisions of Sections

309(b) and 311(c) of the Act; and (3) the Commission should have reconsidered its approval of the merger agreement and designated the matter for hearing after receiving Karin's allegations of repeated violations of Commission rules, and should have revoked the interim operation because of an unauthorized transfer of control.

We will show that there is no merit to these contentions. Although Karin failed to intervene in the proceedings before the Commission, and although its pleadings were procedurally defective, the Commission still considered its allegations to the extent that public interest questions might be involved. The Commission's conclusion that the proposed merger of two of the regular applicants for the frequency formerly operated by station KWK, would serve the public interest, is a reasonable one, and should therefore be affirmed.

I. THE CHALLENGE OF THE JOINT INTERIM OPERATION WHICH WAS AUTHORIZED IN 1965 AND SUBSEQUENTLY AFFIRMED BY THIS COURT IS UNTIMELY AND WITHOUT MERIT.

On December 27, 1965, the Commission released a Memorandum Opinion and Order, FCC 65-1157, authorizing a joint interim operation by RTEI pending selection of a regular applicant to operate on 1380 khz in St. Louis, Missouri.

(A. 10-14). That action was affirmed by this Court in Beloit Broadcasters v. F.C.C., 125 U.S. App. D.C. 29, 365 F.2d 962 (1966). Karin now argues (Br. 21-25) that the Commission's action was beyond the scope of its authority and should be set aside. This contention comes too late. The Commission's action was taken nearly five years ago, appeals were timely filed and this Court upheld the Commission's order. Karin has shown no basis for reopening the matter at this time.

There is, in any event, no merit to Karin's contention that the Commission has no authority to issue interim grants pending the outcome of a hearing on applications for regular authority. Beloit Broadcasters, supra. This Court stated that the Commission may award an interim authorization "if it is clear that the public interest would thus be served." 125 U.S. App. D.C. at 30, 365 F.2d at 363. It further held that "The Commission was warranted in concluding that interim operation by RTEI was in the public interest." In its decision the Court relied on Peoples Broadcasting Co. v. United States, 93 U.S. App. D.C. 78, 209 F.2d 286 (1953), an earlier case in which the Commission's authorization of an interim operation was affirmed and on Community Broadcasting Co. v. F.C.C., 107 U.S. App. D.C. 95, 274 F.2d 753 (1960), where the Court analysed in some detail the Commission's

authority in this area and concluded that issuance of interim operating authority pending completion of a comparative hearing was well within the Commission's authority under the
^{9/}
Communications Act.

Karin's reliance on Folkways Broadcasting Co. v. F.C.C., 126 U.S. App. D.C. 393, 379 F.2d 447 (1967), is misplaced. There, this Court had previously reversed a Commission grant of an application for a construction permit and had remanded the case for a hearing to ascertain if the applicant Crowder was basically qualified. Thereafter, the Commission authorized the applicant to remain on the air pending the hearing. The Court concluded that a temporary operating authority to an individual whose basic qualifications were in dispute "is inconsistent with our mandate and with the Commission's statutory responsibilities." The Court also stressed that "The absence of a strong public interest finding is telling in light of the serious questions regarding Crowder's character qualifications." Thus, Folkways did not involve the authorization of a joint interim operation by qualified applicants pending resolution of a comparative case. Nor did the Court overrule its previous decisions dealing with

^{9/} See also, Office of Communication of the United Church of Christ v. F.C.C., ___ U.S. App. D.C. ___, 425 F.2d 543, 550 (1969).

such interim operations. In fact, in the subsequent United Church of Christ decision, supra, this Court, in ordering a new hearing on applications for a television station made clear that the Commission had the power to authorize an interim operation pending comparative proceedings to select a regular application for the facilities. ____ U.S. App. D.C. ___, 425 F.2d at 550.

II. THE COMMISSION IN APPROVING THE JOINT SETTLEMENT AGREEMENT DID NOT VIOLATE SECTION 309(b) OR SECTION 311(c) OF THE COMMUNICATIONS ACT.

In its brief Karin makes three procedural arguments against the approval of the proposed merger. (a) Section 309(b) was violated because the Commission granted a "substantial amendment" without first giving public notice (Br. 25-26). (b) Section 311(c), 47 U.S.C. 311(c), was violated because the Review Board, a subordinate body, instead of the Commission, determined if the dismissing applicants were being reimbursed for prudent and legitimate expenses (Br. 27-28). (c) The conditions of the merger were improper because Archway was reimbursed for its expenses and also received 25% of Vic-Way's stock.

A. As a result of the merger agreement Victory would own 75% of Vic-Way's stock and Archway 25% of the stock. Karin argues that "there is no question whatsoever" that this

would result in a substantial amendment under Section 309(b), and that "the Commission was absolutely required to give public notice" (Br. 26). There is no merit to this contention.

While Karin now complains about the Commission's failure to publish notice, the record establishes that it had actual notice since its counsel filed informal objections to the proposed agreement in letters dated March 27, April 8, 11, 21, May 14, and June 16, 1969. These letters were received and considered by the Commission, (A. 21, n. 2) before it approved the proposed settlement agreement on June 19, 1969. Thereafter, Karin also sought reconsideration. Since its objections to the agreement were considered by the Commission Karin has failed to show how it was prejudiced by the failure to publish notice of an alleged substantial amendment. See, e.g., Mansfield Journal Co. v. F.C.C., 86 U.S. App. D.C. 102, 110, 180 F.2d 28, 36 (1950).

In any event, the 25% change of stock ownership which was proposed in this case is not considered a substantial amendment in those cases in which Section 309(b) is clearly applicable. ^{10/} The Commission was authorized by Congress to

10/ It is significant that Section 311(c) of the Act which establishes the procedures to be followed by the Commission in merger and dismissal cases does not require publication when a merger of two applicants is proposed, or when an application is dismissed. Section 1.525(b)(1) of the Commission's rules does require publication when dismissal of an application would eliminate a choice between different communities. Here since all the applicants had applied for St. Louis, the Commission concluded that publication was not required. (A. 22).

classify amendments and applications to implement the purposes of Section 309. See 47 U.S.C. §309(g). Section 1.571(j)(1) of the Commission's rules, 47 CFR 1.571(j)(1), establishes that amendments which change frequency, increase power, increase hours of operation, or change station location are deemed to be major amendments. 47 CFR 1.571(j)(1). Similarly, an amendment is deemed major or substantial when an application "is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 percent or more ownership interest in the amended application." 47 CFR 1.571(j)(2). Here Victory, the original applicant, would retain 75% of the stock so that the amendment proposed by the merger is clearly not a "major" one within the meaning of the rule.

Moreover, the basic purpose of the notice provision of Section 309(b) was accomplished in this case. Thus, not only the Commission, but Victory and Archway published notice when the applications were filed. Again the Commission, Victory and Archway published notice when the applications were designated for hearing. The notice provision of Section 309 was designed to give interested parties "an opportunity to learn of the application and to file a petition to deny." H.R. Rep. No. 1800, 86th Cong., 2d Sess. p. 11, 1960 U.S. Code Cong. and Adm. News, pp. 3518-3519. That opportunity was afforded in this case.

B. There is no merit to Karin's claim that the Commission violated Section 311(c) when it permitted the Review Board, a subordinate body, to ascertain whether the expenses for which dismissing parties were being reimbursed were reasonable and prudent as required by Section 311(c)(3) (Br. 27-29). Section 311(c) was added to the Communications Act in a 1960 amendment, Public Law 86-752, approved September 13, 1960, 74 Stat. 892. Thereafter, in 1961, the Act was amended to authorize the Commission to "delegate any of its functions" to an employee board, subject to Commission discretionary review. See 47 U.S.C. 155(d) and Public Law 87-192, approved August 13, 1961, 75 Stat. 400; see also Spanish International Broadcasting Co. v. F.C.C., supra, 128 U.S. App. D.C. at 97-98, 385 F.2d at 619-620. After this change in the Act the Commission created the Review Board and authorized it to act on joint requests for approval of agreements pursuant to Section 311(c). See Report and Order, 27 Fed. Reg. 5671, 5672 (1962). Since that time the Board has ruled on such questions and as the Commission indicated in this case, "the Board has considerable experience and expertise in determining whether specific out-of-pocket expenses have been properly substantiated and were 'legitimately and prudently expended,' as required by section 311(c)(3) of the Communications Act." 18 F.C.C. 2d, at 214. It was for this reason that the Commission authorized

the Board to rule on the disputed expenses in this case.

That delegation to the Board was clearly in accordance with the requirements of the Communications Act and the Commission's rules adopted pursuant to the Act.

Moreover, after the Board had released its Memorandum Opinion and Order, 18 F.C.C. 2d 592, specifying the expenses for which the dismissing applicants could be reimbursed, the Commission fully considered Karin's application for review as contemplated by 47 U.S.C. 155(d). See Spanish International, supra, 128 U.S. App. D.C. at 97-98, 385 F.2d at 619-620. Thus, there is no substance to the argument that the Commission, and not some subordinate body, should have determined that the proposed reimbursements to the dismissing applicants were reasonable and prudent as required by Section 311(c)(3). Significantly, Karin has not challenged any of the specific findings made by the Review Board.

C. Finally, Karin seems to argue that the proposed merger between Victory and Archway violated Section 311(c)(3) because Archway in return for dismissing its application not only received 25% of Vic-Way's stock but also was reimbursed for its expenses in prosecuting the dismissed application (Br. 28-29). The Commission found that a bona fide merger was proposed in this case and that "Archway will be a minority stockholder and it is not unusual for a majority stockholder to contribute more than its pro rata share of capital. Arch-

way further proposes to secure financing essential for the implementation of this agreement and for the future operation of Vic-Way. It also appears that Victory will be reimbursed for its expenses as funds are available in the future."

(A. 23, n. 4).

Karin points to nothing in the merger agreement, in Section 311(c), or its legislative history, which precludes the Commission's approval of the merger proposed by Victory and Archway. On the contrary, Congress recognized in enacting Section 311(c) that the prohibition against payments in excess of expenditures would not apply to bona fide mergers and that in such cases the Commission would have to determine "whether a proposed merger is a bona fide merger of competing interests or whether its merely a device to evade the prohibition applicable to non-merger agreements." H. R. Rep. No. 1800 86th Cong., 2d Sess., 1960 U.S. Code Cong. and Adm. News, p. 3524. Here the Commission concluded that a bona fide merger had been proposed and Karin did not offer any evidence to the contrary.

According to Karin, "[s]ince Victory and Archway still maintain their separate identity from the 'merged' corporation, differing only in the percentage of Vic-Way that each owns, the arrangement is still unfathomable" (Br. 29). However, there is nothing in the Communications Act, or Commission rules which requires that two corporations

which desire to merge their broadcast interests must also merge their corporate identities, and dissolve one of the corporations. Here Victory and Archway did in fact merge their broadcast interests when Archway dismissed its application, and acquired a 25% interest in the application originally filed by Victory.

III. APPELLANT'S INFORMAL PLEADINGS ASKING THE COMMISSION TO RECONSIDER ITS APPROVAL OF THE MERGER AGREEMENT DID NOT RAISE ANY SUBSTANTIAL PUBLIC INTEREST QUESTIONS REQUIRING AN EVIDENTIARY HEARING.

Before approving the proposed settlement the Commission considered Karin's informal objections. (A. 20-24). Subsequently, it also considered two requests for reconsideration, A. 39-44; A. 44-48, even though Karin's pleadings were procedurally defective because it had never sought to intervene in the proceedings and had failed to show why its allegations could not have been made before the Commission had approved the agreement. See Springfield Television Broadcasting Corp. v. F.C.C., 117 U.S. App. D.C. 214, 328 F.2d 186 (1964). Karin lists in its brief (pp. 33-34) eight issues which it claims required an evidentiary hearing. Only three of these are discussed in its argument:

(a) Vic-Way's financial ability to pay the dismissing applicants (Br. 35-37); (b) unfair labor practice charges (Br. 34); and (c) an unauthorized transfer of control question (Br. 37-39). We will show that the Commission correctly concluded that there was no substance to Karin's belated allegations of misconduct, and that an evidentiary hearing was therefore not required.

A. After the proposed settlement agreement had been approved on June 19, 1969, and consummated on July 25, 1969, supra, pp. 6-9, in a request for reconsideration Karin questioned the financial ability of Vic-Way to reimburse the dismissing applicants (Br. 34-35). In support of this contention it submitted an appraisal of its own disputing an earlier appraisal of RTEI's real estate interest which the Commission had relied on in approving the agreement. It also argued that the RTEI leasehold interests were not assignable. Having reviewed the two appraisals, and the provisions of the leases in some detail, A. 41-43, the Commission found that there was no evidence that the earlier appraisal had been made in bad faith; that the disputes between the two appraisers were matters of judgment and expertise; and that the leasehold interests could be assigned or sublet. Under these circumstances, the Commission concluded the leasehold interests had been properly included in its earlier assessment of RTEI's net worth (A. 43).

Relying on Section 309(e) of the Act, Karin asserts that the Commission should have ordered an evidentiary hearing to resolve the dispute between the two appraisals. The pre-grant hearing provisions of Section 309(e) do not apply to informal objections belatedly made in requests for reconsideration.

Springfield Television Broadcasting Corp. v. F.C.C., 117 U.S. App. D.C. 214, 217, 328 F.2d 186, 189 (1964); Valley Telecasting Co. v. F.C.C., 118 U.S. App. D.C. 410, 414-415, 336 F.2d 914, 919-920 (1964); WLIL, Inc. v. F.C.C., 122 U.S. App. D.C. 246, 249-250, 352 F.2d 722, 725-726 (1965). Moreover, this Court has held that "[c]ontradicory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing" where the Commission's detailed analysis of the data before it supports the conclusion that a hearing is not required.

Broadcast Enterprises, Inc. v. F.C.C., 124 U.S. App. D.C. 68, 70, 390 F.2d 483, 485 (1968). "Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing." Stanley Marsh III, et al. v. F.C.C., Case No. 23,234, decided August 7, 1970, Slip Opinion pp. 6-9. Here Karin has not shown that the Commission abused its discretion or was unreasonable in its detailed analysis of the appraisals, and its interpretation of the leases.

B. On the unfair labor practice charges, the Commission observed that "these matters are founded on unsubstantiated allegations not related to our approval of the applicants' joint agreement." A law suit regarding the labor dispute was

pending in a United States district court; and related questions were also pending before the NLRB, and a labor arbitrator. Accordingly, the Commission concluded that "these matters can be adequately considered at a later date if it becomes appropriate to do so." (A. 40-41, n. 3). Karin now argues that it had advised the Commission of the number of the district court case and that "[i]t would seem that advising the Commission of cause numbers and parties should be sufficient factual allegations to alert the Commission" and require an evidentiary hearing (Br. 34). We respectfully submit that this contention is frivolous in view of the pleading standards set out by this Court in Springfield Television Broadcasting Corp. v. F.C.C., supra; Valley Telecasting Co. v. F.C.C., supra; and WLIL, Inc. v. F.C.C., supra, and that the Commission was reasonable in its handling of the unfair labor practice charges.

C. In its last point, Karin maintains that the Commission should have revoked the interim authority because of an unauthorized transfer of control (Br. 37-39). Before the Commission it argued that Victory and Archway had assumed control of the RTEI interim operation without the prior Commission approval of a transfer application required by Section 310(b) of the Communications Act. The Commission found no substance to this charge because the merger agreement

which was approved by Order released June 19, 1969, provided that the interim operation would be transferred to Victory and Archway. Therefore, the Commission's approval of the merger agreement included approval of the transfer of the RTEI stock interests which took place on July 25, 1969. Moreover, the record also reveals that on July 23, 1969, before the merger was consummated the Commission was notified that Victory and Archway were going to assume control of RTEI on July 25, 1969 (A. 48-49). Thus, this is not a case in which a person assumed control without prior Commission consent and then concealed the facts from the Commission. See, e.g., Lorain Journal Broadcasting Co. v. F.C.C., 122 U.S. App. D.C. 127, 133, 351 F.2d 824, 830 (1965), cert. denied, 383 U.S. 967. As this Court there observed, the Commission has advised the industry that "in doubtful and borderline cases, as to whether a proposed transaction would result in a transfer of control within the meaning of Section 310(b), doubt should be resolved by bringing the complete facts of the proposed transaction to the Commission's attention for a ruling in advance of any consummation of the transaction." Here the Commission was informed of the applicants' plans in the proposed merger agreement and it approved those plans prior to the consummation of merger on July 25, 1969. Thus, the agency was "alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation." Lorain Journal Broadcasting Co., 122 U.S. App. D.C. at 133, 351 F.2d at 830.

Among the other issues listed by Karin (Br. 33-34) but not discussed in its argument is another charge of "unauthorized control." The Commission found that there was absolutely no support for this charge (see n. 5, supra).

On the site availability issue, the Commission requires an applicant to have "a reasonable reliance on a good faith assurance that the site will be available at the appropriate time." Christian Fundamental Church v. F.C.C., Case No. 21123, 12 Pike & Fischer, R.R. 2d 2116, 2117, D.C. Cir., decided April 11, 1968. Here when Victory's application was first filed the Commission found reasonable reliance and did not include a site issue. Later it concluded that Karin's request for a site issue "was founded on unsubstantiated allegations." (A. 40-41, n. 3).

As to the allegation of drastic changes in programming format without Commission approval, in both Victory's application and its comments in support of the Vic-Way merger, the Commission was notified of the applicant's belief that there was a need for a Black-owned radio station in St. Louis to serve the needs of that substantial segment (40%) of the community. Thus, the Commission concluded that, contrary to Karin's complaint, the programming "proposals were before the Commission and were considered at the time the merger agreement was approved." (A. 46).

Likewise the Commission was aware of the fact that "[t]he Ford Foundation loan of \$500,000.00 was granted to Vic-Way with the proviso that certain profits from the operation of KWK be used as capital to foster black enterprises in the St. Louis area." It concluded, however, that Karin had offered no support for its assertion concerning the Ford Foundation which would show that "these financial arrangements are contrary to our Rules or the public interest."

(A. 27).

Regarding Karin's charge that radio service was discontinued for a period of ten days without Commission approval, it should be noted that Section 73.71(b), 47 CFR 73.71(b), permits a station to "discontinue operation for a period of not more than ten days, without further authority of the Commission."

In sum, all of Karin's informal and belated allegations that the public interest would not be served by approval of the settlement agreement were considered by the Commission. The Commission's approval of the agreement, resulting in the selection of a qualified applicant whose proposals are especially well suited to the needs of the community, was a reasonable action, clearly within its statutory authority.

The grounds asserted by Karin for setting aside the action are, we submit, hypertechnical and lacking in substance, and provide no basis for the relief it seeks.

CONCLUSION

For the foregoing reasons, the Commission's Order released June 19, 1969, the Memorandum Opinion and Order released October 6, 1969, and the Order released December 8, 1969, should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

August 28, 1970

APPENDIX A

Section 311(c) of the Communications Act of 1934, as amended:

(1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

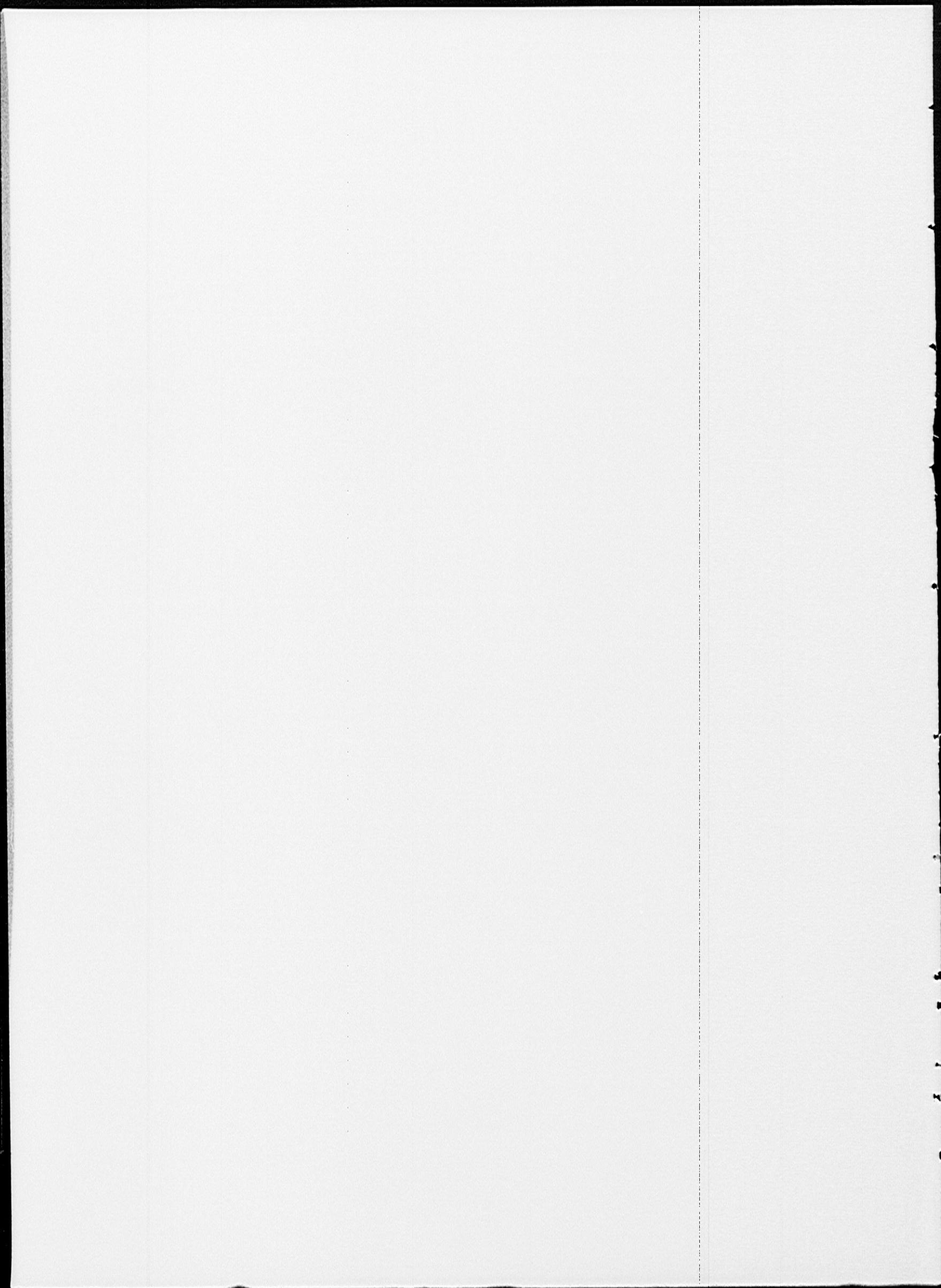
(4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

Section 1.525 of the Commission's Rules and Regulations:

(a) Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the Commission by withdrawal or amendment of an application or by its dismissal pursuant to §1.568, all parties thereto shall, within 5 days after entering into the agreement, file with the Commission a joint request for approval of such agreement. The joint request shall be accompanied by a copy of the agreement and an affidavit of each party to the agreement setting forth

in full all relevant facts including, but not limited to: (1) The exact nature of any consideration (including an agreement for merger of interests) promised or paid; (2) information as to who initiated the negotiations; (3) summary of the history of the negotiations; (4) the reasons why it is considered that the arrangement is in the public interest; and (5) a statement fully explaining and justifying any consideration paid or promised. The affidavit of any applicant to whom consideration is paid or promised shall, in addition, include an itemized accounting of the expenses incurred in connection with preparing, filing and advocating his application, and such factual information as the parties rely upon for the requisite showing that such reported expenses represent legitimate and prudent outlays. No such agreement between applicants shall become effective or be carried out unless and until the Commission has approved it, or until the time for Commission review of the agreement has expired.

(b) (1) Whenever two or more conflicting applications for construction permits for broadcast stations pending before the Commission involve a determination of fair, efficient and equitable distribution of service pursuant to section 307(b) of the Communications Act, and an agreement is entered into to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to §1.568) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section. If upon examination of the proposed agreement the Commission finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities, then the Commission shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,608

KARIN BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VICTORY BROADCASTING COMPANY,
ARCHWAY BROADCASTING CORPORATION, and
VIC-WAY BROADCASTING COMPANY,

Intervenors.

Appeal From Memorandum Opinions
and Orders of The
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR INTERVENORS

FILED AUG 28 1970

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QUESTIONS PRESENTED

A Statement of the Questions Presented by this appeal appears in the brief of the Appellee, the Federal Communications Commission. Intervenors have seen such statement and hereby adopt the questions presented therein.

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BRIEF FOR INTERVENORS

COUNTERSTATEMENT OF THE CASE

This case involves an appeal from a Memorandum Opinion and Order of the Federal Communications Commission, released June 19, 1969, approving a final settlement of the so-called "KWK litigation." That litigation had its genesis in the revocation of license of Standard Broadcast Station KWK, St. Louis, Missouri, and involved the protracted proceedings which ensued, to select

a successor licensee. To understand the background of the case, it will be helpful to start at the beginning, and trace briefly the history of the proceedings below.

By Commission decision released May 29, 1963 (34 FCC 1039, 25 Pike & Fischer RR 577), the Commission revoked the license of KWK Radio, Inc., then licensee of fulltime Station KWK, 1380 kc, St. Louis, Missouri. By Memorandum Opinion and Order released November 1, 1963 (35 FCC 561, 1 Pike & Fischer RR 2d 457), the Commission denied reconsideration. These Commission actions were appealed to this Court, which affirmed in *KWK Radio, Inc. v. Federal Communications Commission*, 119 U.S. App. D.C. 144, 377 F.2d 540 (1964), and *certiorari* was denied by the Supreme Court on March 1, 1965 at 380 U.S. 910 (1965). By these actions, the Commission determined that the license for Station KWK should terminate upon the effective date of its Order.

Consistent with the Commission's regular practice in cases involving revocation or non-renewal of license applications, the Commission set the effective date of its order of revocation at a reasonable time after the exhaustion of all administrative and judicial remedies available to the licensee. Thus, Station KWK continued on the air throughout the revocation proceeding in all its aspects.

On April 1, 1965, the Commission issued a public notice to the effect that it would entertain new applications for stations to utilize the frequency of former Station KWK (FCC 65-260). In addition, the Commission announced that it would entertain applications for interim authorization by two or more applicants for regular authority or by individual applicants not seeking regular authority, for the period required to select the successful applicant for regular authorization.

Some fourteen groups filed applications on or before the May 31, 1965 deadline set by the Commission, including Victory Broadcasting Company—a predominantly Negro-owned group—and Archway Broadcasting Corporation—whose principals include Joseph and Glennon Vatterott, a local St. Louis builder

and attorney, respectively. With the passage of time, some of the applications were dismissed, until a "hard core" of eight remained.

Meanwhile, a Missouri Corporation named "Radio Thirteen-Eighty, Inc." was organized to operate Station KWK on an interim basis, during the pendency of the hearings to determine which applicant should receive a permanent authorization for the facility. After an oral hearing, the Commission, on February 24, 1966, granted an interim operating authority to Radio Thirteen Eighty, Inc. (RTEI). The eight applicants for permanent authorizations, including Victory and Archway, each purchased equal stock interests in RTEI. The conduct of the interim operation was governed, *inter alia*, by a Shareholders Agreement, executed in May, 1965. That Agreement, which was submitted to the Commission and approved by same, looked to the possibility of simplification and/or complete settlement of the hearings, through the dismissal of applications. To that end, Paragraph 6 of the Agreement made specific provision for applicants to dismiss their applications, receive reimbursement of their legitimate and prudent expenses from the surviving applicants, and surrender their stock interests in RTEI to the corporation.

The Commission's authority to grant an interim authorization to RTEI was challenged, and an appeal was taken to this Court by Beloit Broadcasters, Inc., which was then a party to the proceedings below. Upon careful consideration of all of the arguments advanced in opposition to the grant of the interim operating authority, this Court affirmed the Commission. *Beloit Broadcasters, Inc., v. FCC*, 125 U.S. App. D.C. 29,365 F.2d 962 (1966).

With Station KWK operating on an interim basis under the auspices of RTEI, proceedings continued before the Commission to select a permanent operator of the station. On February 13, 1967, the applications of the various parties for permanent authorizations were designated for hearing before an Examiner appointed by the Commission. Several pre-hearing and hearing sessions were held, but—with eight competing applicants each striving to be the victor—it was obvious to all concerned that the selection of an ultimate winner would take a long, long time.

Accordingly, the several applicants entered into negotiations, looking towards a possible settlement of the case. On November 2, 1968, these negotiations finally bore fruit, and a settlement agreement was signed, subject to FCC approval. The Agreement provided for the organization of new Missouri Corporation, Vic-Way Broadcasting Company, to be owned biracially, 75% by Victory Broadcasting Company, and 25% by Archway Broadcasting Corporation. With the aid of loans from the Ford Foundation and Bank of St. Louis, the legitimate and prudent expenses of all of the applicants for authorizations, except Victory, and capital investments and loans made by such applicants to RTEI were to be reimbursed, and said applications were to be dismissed. The application of Victory Broadcasting Company was to be amended to specify the new corporation, Vic-Way, as the applicant. On December 23, 1968, a joint petition was filed with the Commission, requesting Commission approval of the settlement agreement, grant of a construction permit to Vic-Way for a new and permanent transmitting plant to be owned by Vic-Way, and dismissal of all of the competing applications except that of Victory Broadcasting Company (as amended).

On March 27, 1969, legal counsel for Karin Broadcasting Company wrote to the Commission's Hearing Examiner, designated to preside in the "KWK case." Thereafter, several other informal complaints or objections were filed by Karin Broadcasting Company with the Commission or its delegated authorities. Karin claimed to be a Missouri corporation, whose stockholders allegedly included most of the employees of the interim KWK operation, being conducted by Radio Thirteen-Eighty, Inc., as well as certain outside investors. Karin stated, in substance, that it had been organized for the purpose of applying for a construction permit for a station to operate on the 1380 kc frequency at St. Louis. It requested the Commission not to approve the settlement but, instead, to allow Karin to file an application for the facility. Karin did not, however, at any time tender an application. Nor did it file a petition for intervention in the proceedings, as permitted by Section 309 (e) of the Communications Act and Section 1.223 of the Commission's Rules and Regulations.

On June 19, 1969, the Commission issued an Order overruling Karin's objections and granting the joint petition. In its order, the Commission directed its Review Board to determine the amount of reimbursements to be paid to each dismissing applicant. The Board did this, by Memorandum Opinion and Order released July 10, 1969. Pursuant to the foregoing actions, a construction permit has been issued to Vic-Way Broadcasting Company.

On August 4, 1969, Karin filed a so-called "Petition for Reconsideration and Application for Review," in which it argued, *inter alia*, that Vic-Way failed to possess the requisite qualifications to be a broadcast permittee, and that the Commission's actions approving the settlement agreement and granting a construction permit to Vic-Way were not in the public interest.

On October 1, 1969, the Commission adopted a Memorandum Opinion and Order denying Karin's "Petition for Reconsideration and Application for Review." Karin is assertedly appealing to this Court from the Commission's Memorandum Opinion and Order of October 1. On December 1, 1969, Karin filed a "Motion to Stay" in this Court. That Motion was denied on December 22, 1969. A second Motion for stay, filed by Karin, was denied by this Court on May 25, 1970.

SUMMARY OF ARGUMENT

I.

Appellant has failed to establish that it is a "party in interest" or "person aggrieved or whose interests are adversely affected", entitled to maintain an appeal in this Court, pursuant to Section 402(b) of the Communications Act. Moreover, the appeal is untimely, Appellant having failed to timely appeal from, or seek rehearing of, the basic Order of the FCC to which it takes exception.

II.

Appellant's attack on the FCC's 1966 Order, authorizing interim operation of Radio Station KWK, St. Louis, Mo., pending the selection of a permanent licensee, is blatantly untimely. The validity of the interim grant was challenged in an earlier appeal to this Court by Beloit Broadcasters, Inc., and cannot now be again attacked by Appellant. Furthermore, Appellant has made no arguments of any substance which were not disposed of in the earlier appeal.

III.

Appellant's argument that the amendment of the Victory application to substitute a corporation 75% owned by Victory as the applicant, required publication and an invitation to new applicants to apply for the 1380 kc facility is predicated on a misunderstanding of the pertinent provisions of the Communications Act and the Commission's Rules. The provisions of the Act requiring publication of major amendments were never intended to apply to a situation such as the one here involved, where a case was already in hearing status. Furthermore, even if the case had not been in hearing, the publication requirements would not have applied because the amendment was minor in nature, not major.

IV.

The provisions of the agreement of settlement, pursuant to which the Commission granted Victory's application (as amended to make Vic-Way the applicant) constitute a fair and reasonable, good faith arrangement, which made possible the establishment of the first bi-racially owned radio service to the Negro community in St. Louis, Missouri.

V.

Appellant's attacks on the character and other qualifications of Intervenors were properly dismissed by the Commission. Appellant offered nothing of substance to support its allegations that Intervenors lacked the requisite qualifications to receive the relief sought from the Commission.

ARGUMENT

I. KARIN BROADCASTING COMPANY IS WITHOUT THE REQUISITE STANDING TO MAINTAIN THIS APPEAL

To maintain an appeal from an Order of the Federal Communications Commission, pursuant to Section 402(b) of the Communications Act, an appellant must demonstrate that he possesses the requisite standing, *i.e.*, that he is a "party in interest" or "person aggrieved or whose interests are adversely affected" by the order from which appeal is taken. Section 402(b)(6) of the Act; *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Mansfield Journal Company v. FCC*, 84 U.S. App. D.C. 341, 173 F.2d 646 (1949).

Appellant herein has not demonstrated and cannot demonstrate that it was either a party in interest to the proceedings below, or to the proceedings in this Court. At best, its position has been no more than that of an officious intermeddler.

Although the Communications Act and the Commission's Rules make specific provision for formal intervention in Commission proceedings, Appellant never attempted to so intervene,¹ presumably because it was well aware that it could not establish the requisite standing. Thus, it failed to exhaust the administrative remedies available under the Act and the Commission's rules, and its appeal to this Court is fatally defective. *Spanish International Broadcasting Company v. FCC*, 128 U.S. App. D.C. 93, 385 F.2d 615 (1967).

¹ Section 309(e) of the Communications Act and Section 1.223 of the Commission's Rules and Regulations.

In its informal filings before the Commission, Karin claimed aggrievment on the basis that it desired to file an application for the KWK license and that the Commission did not afford it an opportunity to file such an application. In fact, any such application by Karin would have been four years too late.

Although the interim operation of Radio Thirteen-Eighty, Inc., began in 1965, nothing whatever was heard from Karin Broadcasting Company, until the approximate time when the possibility that Victory Broadcasting Company, Inc., would become the dominant owner of KWK became a matter of public knowledge in St. Louis. It was only then, in March, 1969, that Karin filed the first of many informal objections and letters to the Commission and its officials, seeking to destroy the settlement of the litigation which had been negotiated by months and years of hard bargaining among the eight competing applicants.

This appeal is itself untimely, and should be dismissed for that reason, if for no other. The Commission's basic Memorandum Opinion and Order, approving the "St. Louis settlement" was released on June 19, 1969. Pursuant to Section 405 of the Communications Act, petitions for reconsideration were due for filing 30 days after the release of said Order. But while Karin filed a Motion for Stay within the statutory period, (promptly denied by the Commission), it did not file anything even vaguely resembling a petition for reconsideration until August 4, 1969, 46 days after the Commission's order was released.

II. APPELLANT'S ATTEMPT TO RE-LITIGATE THE ORIGINAL ISSUE
ANCE OF AN INTERIM OPERATING AUTHORITY FOR KWK IS
BOTH UNTIMELY AND WITHOUT MERIT

Appellant's attack on the Commission's original grant of an interim operating authority for KWK is another example of the blatant untimeliness which characterized Appellant's attempts to participate in the proceedings below, and has carried over into the prosecution of the instant appeal. The interim operating authority was originally issued on February 24, 1966, and successfully survived an appeal to this Court taken by Beloit Broadcasters, Inc. *Beloit Broadcasters, Inc., v. FCC*, cited *supra*. So far as the validity of the interim operation is concerned, the *Beloit* decision constitutes the "law of the case" and no further challenges may now be made to the original establishment of the interim authority, even if predicated on new arguments not made to the Court at the time of the *Beloit* appeal.

In point of fact, however, and contrary to Appellant's assertion in its brief, Appellant has not made any new contentions of substance which were not advanced in the *Beloit* appeal, and struck down by this Court. The contention that the Commission acted improperly because it failed to hold an evidentiary hearing or make findings of fact concerning need for service was argued extensively by Beloit in Section 1 of the argument portion of its brief, and was dismissed by this Court with the simple observation that, "The Commission may in some circumstances award an interim authorization without holding a hearing if it is clear that the public interest would thus be served" [citing *Peoples Broadcasting Co. v. United States*, 93 U.S. App. D.C. 78,209 F.2d 286 (1953)].

The actions of this Court in the *Beloit* case, the *Peoples* case and the case of *Community Broadcasting Company v. FCC*² effectively dispose of Appellant's challenge to the statutory authority of the Commission to authorize interim

² 107 U.S. App. D.C. 95, 274 F.2d 753 (1960).

operations. As to Appellant's contention that the interim operation was "open-ended" (i.e., not limited to a specific time period), it is clear that the interim was and is limited to the time period required to complete the proceedings to make a permanent authorization, and construct the facilities authorized thereunder. A permanent grant has now been made to Vic-Way, and construction of the facilities authorized by that grant is now approximately 50% complete. Thus, the interim operation of KWK is drawing to a close—having served the public interest by maintaining continuity of service from KWK during the pendency of litigation which would have been terminated much sooner, had it not been for the disruptive series of informal complaints and objections filed by Appellant before the Commission.

III. THE AMENDMENT OF VICTORY'S APPLICATION TO SPECIFY VIC-WAY AS THE APPLICANT REQUIRED NO PUBLICATION

The argument that the amendment of Victory's application to specify Vic-Way as the applicant required public notice pursuant to Section 309(b) of the Communications Act is based on a misunderstanding of both the meaning of the Act, and the nature of the amendment. A reading of Section 309 of the Act, taken as a whole, makes it crystal clear that Sections 309(a), (b) and (c) relate solely to the procedures which the Commission is to follow *prior* to designation of an application for hearing. Subsection (d) sets up a procedure for granting an application without a hearing where the Commission can find, without a hearing, that such a grant serves the public interest. If the Commission cannot so find, Subsection (d) directs the Commission to proceed under Subsection (e). Subsection (e), in turn, refers back to Subsection (a) and states that "If, in the case of any application to which Subsection (a) applies, the Commission is unable . . . [to find without a hearing that a grant would serve the public interest] . . . it shall formally designate the application for hearing".

Once a hearing involving two or more applications has been ordered, Section 311(c)(3) of the Act makes specific provision for a merger of the applications, in order to settle the proceeding, and lays down no requirement for any

further public notice of the merger. Thus, it is quite clear from the Act that the provisions of Section 309(b) were never intended to apply to mergers in hearing. But even assuming, solely *arguendo*, that the provisions of Section 309(b) did somehow apply, the amendment of Victory's application to specify Vic-Way as the applicant was not a "substantial" amendment requiring any public notice. On the contrary, stripped of technicalities the amendment did no more than to add a 25% minority stockholder to the Victory proposal—with Victory retaining majority ownership through its ownership of 75% of the stock of Vic-Way. Pursuant to the Rules adopted by the Commission to define "major" and "minor" amendments (as the Commission is permitted to do, pursuant to Section 309(g) of the Communications Act), such amendment is classified as "minor", not "major". See Section 1.571(j)(2) of the Commission's Rules.

Appellant also argues that publication should have been required pursuant to the provision of Section 1.525(b)(1) of the Commission's Rules, which makes provision for publication and an invitation to new applicants, where an agreement is entered into which results in the dismissal of one or more applications, and the Commission finds such dismissal would "unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities". The answer to the foregoing argument is simple: the Commission did not find that the dismissal of the six applications involved in this proceeding would "unduly impede achievement of a fair and equitable distribution of radio frequencies . . .". As the Commission noted, the applications involved in the proceeding all involved proposals to serve the same city, St. Louis. In reality, they were all pretty much the same proposals. Hence, there was no basis upon which the Commission could make the findings necessary to trigger the operable provisions of Rule 1.525(b)(1).

IV. THE REIMBURSEMENTS AGREED UPON BY THE PARTIES
WERE REASONABLE AND PROPER AND THE COMMISSION'S AP-
PROVAL THEREOF WAS WITHIN ITS DISCRETION

Contrary to Appellant's description of the reimbursement provision as "unfathomable," the arrangements between the parties were, in fact, reasonable, understandable, and proper. Altogether, there were eight applicants who were parties to the settlement agreement. The Agreement provided for seven of the eight applicants to dismiss their proposals. Each dismissing applicant received reimbursement for the legitimate and prudent expenses incurred in the prosecution of his application, and his investment in the interim operation was returned to him. *Not one applicant received even one penny more than he had actually expended.* The Commission's Review Board, in fact, scrutinized all of the expense statements submitted by the applicants, in painstaking detail.³ Some items were allowed, others disallowed, in order to make sure that the basic principle was followed, that no applicant was to receive any "profit" from the reimbursement.

The arrangements as between Archway and Victory are neither hard to understand nor improper. Out of more than 6,000 radio stations in the United States, a mere handful of six standard broadcast stations were owned by Negroes at the commencement of the KWK litigation, and there was no Negro-owned radio station in St. Louis. Victory's purpose in pursuing the litigation was twofold: it had a business motive, of course, but it also had a social motive. Through the establishment of a first Negro-owned station in St. Louis, it hoped to establish a communications facility which would have a special rapport with the Negro community—and which would have a special significance and meaning to that community, different from the Negro-programmed, white-owned stations.

³ See, *Great River Broadcasting, Inc.*, 16 Pike & Fischer Radio Regulation 2d, p. 840.

As the litigation progressed, however, it became clear that the most fair and speedy method of achieving Victory's goal was to enter into an amicable and honorable settlement of the proceeding. This took capital. Archway's principal possessed important banking connections which would be instrumental in getting that capital. Accordingly, Victory thoroughly welcomed the opportunity to associate itself with Archway, under an arrangement which would insure the establishment of the kind of program service to the Negro community which Victory envisioned.

As a part of the settlement, Archway's application was dismissed. Thus, it was proper for Archway to claim reimbursement. That reimbursement was used, however, to purchase stock in Vic-Way, so that a substantial portion of the funds returned to Archway were, in turn, returned to Vic-Way—the holder of the permanent KWK authorization.

Victory's application was not dismissed. Moreover, Victory emerged with 75% of the stock of Vic-Way—a controlling interest, for most purposes. In return, as a part of the good faith bargaining which led to the settlement Agreement, Victory elected not to claim reimbursement. This, Victory had every right to do; the statute does not require *any* applicant to claim reimbursement if it does not choose to do so.

As a part of its deliberations into the question of Vic-Way's ability to accomplish the reimbursement, the Commission elected to inquire into the valuation of RTEI's assets, including certain leasehold valuations. RTEI submitted an appraisal of said leaseholds, prepared by Harry Herring, a prominent real estate appraiser in the St. Louis area. The Herring appraisal amounted to \$500,000. The Commission relied on the appraisal in its Order, released June 19, 1969 (18 FCC 2d 212), approving the settlement Agreement.

In a "Petition for Reconsideration and Application for Review" filed August 4, 1969, by Appellant—and allegedly directed against a decision of the Review Board, released July 10, 1969, in which the Board passed upon the validity of the expense claims advanced by the dismissing of applicants—Appellant

attempted to refute the Herring appraisal by submitting another and different appraisal prepared by another appraiser. In its Memorandum Opinion and Order of October 1, 1969, dismissing the "Petition for Reconsideration and Application for Review," the Commission aptly pointed out that Appellant had failed to establish that it should be made a party to the proceeding and that its petition was, therefore, procedurally defective. Thus, Karin possessed no standing to require the Commission to hold a hearing on the question of the leasehold valuation or on any other question, and the decision whether to accept the appraisal prepared by Mr. Herring was strictly within the Commission's discretion. *Spanish International Broadcasting Company v. FCC*, cited *supra*. There being no evidence whatever to challenge Mr. Herrings's integrity or qualifications or the good faith of the appraisal, and Appellant's "Petition for Reconsideration and Application for Review" being both untimely and procedurally defective, the Commission acted well within its discretion in refusing Appellant's request for an evidentiary hearing on the leasehold valuation issue.

This is not to say, however, that the Commission ignored the issue. It carefully compared the two appraisals, and noted the reasons for the differences between them.⁴ Upon such comparison, the Commission was further assured that its initial judgement concerning the good faith and validity of the initial appraisal was correct.

⁴ These reasons included the fact that the Karin appraisal failed to include 36,992 square feet which is part of the leasehold and was included in RTEI's appraisal; that the Karin appraisal gave no value to leasehold improvements; that the Karin appraisal estimated the land value at \$.15 less than the \$.90 figure per square foot given in the RTEI appraisal; that the Karin appraisal used a discount and rental rate of 8% instead of the 9% used by the RTEI appraiser, in accordance with the current money market; and that the Karin appraiser improperly attempted to determine the value of the leasehold interest by deducting the value of the lessor's remaining interest from the market value of the land and by treating rents as payable in arrears, while they are actually payable in advance. See Paragraph 4 of the Commission's October 1 Memorandum Opinion and Order, 17 Pike & Fischer RR 2d 533, 19 FCC 2nd 934.

V. THE COMMISSION ACTED WITHIN ITS DISCRETION IN DISMISSING APPELLANT'S ALLEGATIONS DIRECTED AGAINST THE QUALIFICATIONS OF THE INTERVENORS

At pages 33 and 34 of its brief, Appellant lists eight charges of improper conduct, levelled against the Intervenors by Appellant, and takes the Commission to task for failing to hold evidentiary hearings on these charges. Appellant apparently fails to understand that *anyone* can level charges of improper conduct against *anybody*. However, in order to be entitled to a hearing on such charges in proceedings before the Federal Communications Commission, the person making such allegations must timely establish that he has the requisite standing to participate in the proceedings, and must properly substantiate the charges with allegations of fact, which, if true, would demonstrate that the Commission should not grant the authorization which is the subject of the proceedings. *Spanish International Broadcasting Company v. FCC*, cited *supra*. Karin did neither.

The matter of standing has been discussed in detail, *supra*. Suffice to repeat here that Karin never established its standing or even attempted to do so. It did not petition to intervene; it was never made a party to the proceedings below. Moreover, each of Karin's allegations was answered by Intervenors on the merits, and was shown to be lacking in substance.

A. The Availability of the Vic-Way's Transmitter Site

Take, for example, the matter of the availability of Vic-Way's proposed transmitter site—a matter to which Karin has devoted much space in its brief. There is no statutory requirement whatever that an applicant have any particular transmitter site available, and until approximately the year 1950, the Commission did not itself require that any particular site be specified by applicants for radio facilities.

In recent years, for purposes of convenience and preciseness in the processing of applications, the FCC has required applicants for new radio facilities

to specify a particular site, and to have "reasonable assurance" that the site will be available. It is not necessary for applicants to own the site, however, nor is it necessary to have the site zoned for use as a radio station until after the Commission grants a construction permit. *W. Gordon Allen*, 13 Pike and Fischer RR 1120 (1956); *El Camino Broadcasting Corp.*, 12 FCC 2d 329 (1968).

In accordance with the Commission's requirements, Victory Broadcasting Company had a specific transmitter site under option, and this option was acquired by Vic-Way, following the approval of the settlement agreement. On or shortly after the day when settlement was closed, and the dismissing applicants were reimbursed for their expenses, Vic-Way actually purchased the site.

Following the purchase of the site, Vic-Way (Victory's successor) commenced proceedings to have the site properly zoned. However, representatives of Karin showed up at the zoning hearings and proceeded to disrupt the proceedings. Other persons contacted the property owners living near the proposed site—which was situated near Granite City, Illinois, in an area which is all-Caucasian in character—and spread rumors to the effect that the proposed re-zoning would enable the site to be used for a Negro night club. As a result of these activities, the zoning was not approved.

Vic-Way, however, immediately selected another site—very near the one originally specified—and already zoned for radio station use. A proper application was filed with the Commission for a minor modification of Vic-Way's construction permit to specify the alternative site, and such was granted by the Commission. Construction is proceeding apace. Hence, the entire matter of the availability of the site is moot.

B. The Charge of Unauthorized Transfer of Control.

The charge that Victory and Archway participated in an unauthorized transfer of control of the interim operator, RTEI, is equally insubstantial. The settlement agreement, approved by the Commission, clearly contemplated that

none of the eight applicants for permanent authorization would have any further connection with KWK after the consummation of the Agreement, except Victory and Archway (the owners of Vic-Way). Consequently, it was natural and logical for the six applicants who were to have no further connection with the station to surrender their stock to RTEI on the closing day.

Such was the interpretation placed on the Agreement and on the Commission's approval of the Agreement, by Victory and Archway. In its Memorandum Opinion and Order released October 6, 1969, the Commission reaffirmed the rectitude of that reasonable interpretation.

As the appropriate agency charged by Congress with the administration of the Communications Act, the Commission has broad discretion to administer the provisions of the Act relative to transfers of control of the holders of broadcast authorizations. Its decision to approve a transfer of control of RTEI to Victory and Archway—pending the completion and licensing of the permanent facilities awarded to Vic-Way—was well within its discretion.

C. The Charge that the Programming of KWK Has Been Changed

Appellant's complaint that the programming of KWK has been changed under the stewardship of Victory and Archway merits some special comment. In its original application to the Commission for a construction permit, Victory Broadcasting Company advised the Commission that it was "convinced that the Negro community in St. Louis has needs which are not being fulfilled by the so-called 'race stations' operated by white persons for the 'benefit' of Negro audiences." By amendment to its application, dated June 23, 1966, Victory reported to the Commission that it had completed a survey of the needs of the St. Louis community—especially the Negro community—and supplied a detailed programming plan to meet those needs. Thus, the Commission has been fully advised for more than four years that Victory contemplated a Negro-oriented program format.

During the interim operation of KWK by the eight contesting applicants, the program format of KWK consisted primarily of what is known in the industry as "sweet music" or "MOR" (middle-of the-road). The station did not attempt to play a social role.

With the Commission's approval of the settlement agreement, the grant of the Victory application (as amended to make Vic-Way the applicant), and the retirement of the six applicants whose expenses have been reimbursed, Station KWK has commenced to program to the Negro community, in accordance with the plans which Victory disclosed to the Commission more than four years ago. To suggest that this is a startling or surprising development, not contemplated or approved by the Commission, is sheer nonsense. The very essence of the settlement agreement was the establishment of a bi-racially owned radio service to the Negro community of St. Louis. The Commission's actions were clearly directed to the establishment of such a service, on a permanent basis, as expeditiously as possible.

D. Complaints of Unfair Labor Practices

Complaints of unfair labor practices are filed against many communications companies. The FCC is not, however, the appropriate forum for the adjudication of such complaints. Rather, such complaints are properly the subject of proceedings before the NLRB, or the courts.

The court action, involving a labor complaint and referred to in Appellant's brief, has been voluntarily dismissed at the request of the plaintiff. Other complaints—doubtless inspired by the Appellant or its stockholders—are being litigated before the NLRB at this time, and will be properly disposed of by that agency, in due course. There exists no valid reason why the Communications Commission should become involved in such litigation, and the Commission very properly declined to do so.

E. Other Charges

As to the remaining charges levelled by Appellant, there simply were no unauthorized interruptions in the service of KWK—contrary to Appellant's assertions. Neither were there any loans containing improper conditions.

One final word should be said concerning Appellant's complaint that four corporations—Victory, Archway, RTEI, and Vic-Way—continue to be connected with KWK. While it is difficult to follow Appellant's arguments in this respect, Appellant would apparently have preferred that certain of these corporations be dissolved, for some reason or other. But such was not the most practicable way of handling the settlement. By the terms of the Commission's original order setting the KWK case for hearing, quoted at page 4 of Appellant's own brief, the RTEI interim operation is to continue until "program test authority" is issued to the permanent KWK operation. "Program test authority" cannot, however, issue, until the permanent permittee, Vic-Way, has completed construction and filed an application for license pursuant to Section 308(b) of the Communications Act. Hence, dissolution of RTEI at this time would be impracticable.

Following the completion of construction by Vic-Way, and the grant of program test authority (and, later, a license) to Vic-Way, the operation of KWK will come under the permanent stewardship of Vic-Way. 75% of the stock of Vic-Way is owned by Victory; 25% by Archway. There is no prohibition in the Communications Act or anywhere else which restrains two corporations from owning the stock of a third. Many communications companies are so owned. In this instance, many practical and legal advantages were adjudged to flow from keeping the corporate identities of Victory and Archway intact. Appellant has failed to show any reason why a different procedure would have been superior, in any respects whatever.

CONCLUSION

For the foregoing reasons, and those set forth in the brief for appellee, the Orders of the Federal Communications Commission under review should be affirmed.

Respectfully submitted,

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August 21, 1970

Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*

Section 308. (b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

Section 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis;

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe, shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply —

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under Section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under Section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to Section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of Section 308(a).

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including

issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein;

(2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act;

(3) every license issued under this Act shall be subject in terms to the the right of use or control conferred by Section 606 of this Act.

Section 311. (c) (1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all parties to the agreement. Such request shall

contain or be accompanied by full information with respect to the agreement, set forth in such detail, form and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience or necessity only if the amount or value of such payment as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

**Proceedings To Enjoin, Set Aside, Annul, or
Suspend Orders of the Commission**

* * *

Section 402. (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1) By any applicant for a construction permit for station license, whose application is denied by the Commission.
- (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

§1.223 Petitions to intervene. — (a) Where, in cases involving applications for construction permits and station licenses, or modifications or renewals thereof, the Commission has failed to notify and name as a party to the hearing any person who qualifies as a party in interest, such person may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest. Where such person's interest is based upon a claim that a grant of the application would cause objectionable interference under applicable provisions of this chapter to such person as a licensee or permittee of an existing or authorized station, the petition to intervene must be accompanied by an affidavit of a qualified radio engineer which shall show, either by following the procedures prescribed in this chapter for determining interference in the absence of measurements or by actual measurements made in accordance with the methods prescribed in this chapter, the extent of such interference. Where the person's status as a party in interest is established, the petition to intervene will be granted.

(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, and must be accompanied by the affidavit of a person with knowledge as to the facts set

forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceeding.

(c) The granting of any petition to intervene shall not have the effect of changing or enlarging the issues specified in the Commission's notice of hearing unless the Commission shall on motion amend the same.

(d) Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto shall set forth the interest of petitioner in the proceedings, show how such petitioner's participation will assist the Commission in the determination of the issues in question, and set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section. Such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth in the petition, and where petitioner claims that a grant of the application would cause objectionable interference under applicable provisions of this chapter, the petition for leave to intervene must be accompanied by the affidavit of a qualified radio engineer showing the extent of such alleged interference according to the methods prescribed in paragraph (a) of this section. If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

§1.525 (b) (1) Whenever two or more conflicting applications for construction permits for broadcast stations pending before the Commission involve a determination of fair, efficient and equitable distribution of service pursuant to Section 307(b) of the Communications Act, and an agreement is entered into to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to §1.568) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section. If upon examination of the proposed agreement the Commission finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities, then the Commission shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.